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PUBLIC LAW

Spring, 1958

COMMENT

In this country, two quarterlies have, for the last two years, been published dealing with constitutional and administrative law. The general scope of *Public Law* and the *British Journal of Administrative Law* has been much the same. It has now been decided to amalgamate these two quarterlies under the name of *Public Law incorporating the British Journal of Administrative Law.* Readers of the latter will find in this amalgamated publication most of the features to which they are accustomed such as editorial comment, articles, and book reviews. The section called Current Survey contains annotations of much material not hitherto covered by the *British Journal of Administrative Law.* The *Administrative Law Reports* of that Journal will not be published under that title; much of their contents will be found in Current Survey, though some reports (for example, decisions relating to industrial disputes) will disappear.

It is hoped that the effect of this amalgamation will be the production of one quarterly dealing adequately with all matters of interest to those concerned with the constitutional and administrative law of the Commonwealth.

The relationship between Parliament and the nationalised industries lies at the heart of some of the most important constitutional and practical problems of contemporary government. The existence of these industries raises questions of the desirable limits of State activity. Their separation from Departments can be seen as an indication of the things Departments are thought to be unsuited for. The hesitation to subject the industries to full parliamentary scrutiny is believed by some to reflect, not necessarily unfavourably, on the organisation and methods of the Civil Service. But this hesitation also reflects on Parliament. For as there may be limits to the things which Departments can do well, so there are limits to the things which Parliament can do well. From time to time, as today, views are expressed and letters are written, both by Parliamentarians and by those outside, that the House of Commons is less efficient than it might be. And the arguments tend to criticise either procedure or personnel or both. On questions of procedure, there is little of value that can be said by those without direct and personal experience, as Members, of one of the Houses. It is, as ever, possible for others to make clever suggestions. But these are seldom novel or, where novel, practicable, or, where novel and practicable, likely to improve present procedure. Criticism of personnel is healthy and necessary. Yet it should be restricted to individuals who appear to be incompetent. It should ascend to personalities. Descent to generalities—that the standard was higher in the old days, that no one of stature is coming forward, that our representatives are little men—smacks too much of Pharisaism. It does not lie in the mouth of successful men in other walks of life to be scornful of those who choose to stand for Parliament.

The House of Commons, like every other institution, is capable only of those things which it is suited for. And how far it is suited to exercise control over bodies—such as the nationalised industries—which have no responsible representative in Parliament has proved a difficult question. After certain attempts which were abortive, a Select Committee was set up simply "to examine the Reports and Accounts of the Nationalised Industries." How it would proceed, how it would interpret its terms of reference, was purposely left vague. Now that its first Report has been issued, what was vague becomes a little more substantial.

The Committee met on seventeen occasions between February 12 and October 29, 1957. Sir Patrick Spens was in the Chair. The first of the annual Reports and Accounts to be published after the Committee was set up were those of the North of Scotland Hydro-Electric Board and the South of Scotland Electricity Board. The Committee examined these first but, before doing so, investigated the extent, as their Report says, to which the finances of these corporations—and those of other nationalised industries—were controlled or supervised by Government Departments. They called before them, on four occasions, Mr. A. T. K. Grant, C.M.G., an Under-Secretary in charge of the Trade and Industry Division of the Treasury, who had been nominated by the Treasury to help the Committee. For the previous three years Mr. Grant had been, as he put it, "the contact with the Departments which deal with the industries, and therefore any major questions which come up would come through me." The Committee also heard the Secretary of the Scottish Home Department and an Assistant Secretary in that Department on the general question of financial control, as well as on the Reports and Accounts. They heard the Chairman, Deputy Chairman, and a part-time member of the South of Scotland Electricity Board; the Chairman, General Manager, and Chief Accountant of the North of Scotland Hydro-Electric Board; and five Scottish M.P.s.

Later, the Committee turned their attention to the Report and Accounts of the National Coal Board and heard evidence from the Chairman, the Deputy Chairman, and the Economic Adviser. This examination was not completed when the session ended.

The Committee's investigations into the operations of the South of Scotland Board were not pursued mainly because 1956 was the first full year of its existence. So the Report is principally concerned with the general question of financial control by the Treasury and the Scottish Home Department, and with the affairs of the Hydro-Electric Board. The investigation of the general question adds little to what is known. Treasury influence on the level of investment and control over borrowing is shown to be fairly considerable. The Committee report that, having looked at only two of the eight nationalised Boards, they are not yet able to say if there are any grounds for thinking that the influence of the Treasury has in any way unduly hampered or is hampering the initiative of the Boards but that neither of the two Boards made any such complaints.

When the Committee came to look at the Hydro-Electric Board, they dealt particularly with rural electrification, capital expenditure, contracts, depreciation, estimated costs of undertakings, relations with the South of Scotland Board, and the Consultative Council. The Board had been criticised for unfair tariffs because of its practice of using a common system for rural and urban supply. The Committee rejected this criticism. The Board was also criticised, by the Highland M.P.s referred to, for failing in its duty to carry electrical power quickly enough to the isolated areas. This also the Committee rejected. On contracts, the Committee recommended that all should be put out to competition. They used rather stronger words in expressing their opinion on the inaccuracy of estimates.

At the conclusion of their first meeting, on February 12, 1957, it was ordered: "That the Chairman do write to the Chairmen of the Boards of the Nationalised Industries, informing them of the terms of reference of this Committee, and assuring them that this Committee will be always ready, so far as their terms of reference allow, to help them in their relations with the House of Commons." Alongside this may be set another statement. When the Committee was faced by the five Highland M.P.s, led into battle by Sir David Robertson, Sir Patrick Spens opened his remarks from the Chair by saying: "We would like to say that we are not going to make ourselves a receptacle for complaints from Members of Parliament about individual instances in their constituencies. That would obviously tie us down day and night *ad infinitum*. Therefore we cannot accept anything of that sort. But where any Member, on a matter of policy being adopted by any of the Boards, wishes to make representations to us regarding dissatisfaction and so on, and wishes to illustrate it shortly by giving individual instances, then we think it is right that we should hear them; and that then, of course, we should give the Board or body concerned an opportunity of replying before we publish the evidence. But the evidence will be published and will be at the disposal of the House."

In these two statements lie the difficulty and the possible value of this Committee. In contemporary jargon, it must seek to operate on a high level of generalisation. From the remarks of the Chairman, it seems unlikely to develop into an institutionalised Question Time. But it must be *informed* in its approach to the Reports and Accounts. It must know what are the important questions. And here its lack of an officer of the standing of the Comptroller and Auditor General may prove a serious weakness. For at present it is left to the Committee to decide whether individual and detailed complaints should be disregarded or investigated. Their criterion is policy and generality. But they would be greatly helped by an officer of high standing.

In the House of Lords on November 19, 1957, Viscount Stansgate asked Her Majesty's Government who issues the writs summoning the Attorney-General and the Solicitor-General to attend the House of Lords; what is the text of those writs; what rights of sitting, speaking and voting they confer; and what was the last date on which either of the Law Officers responded.

The following statements were made. The Lord Chancellor (Viscount Kilmuir): My Lords, writs commanding the attendance of the Attorney-General and the Solicitor-General as Assistants to the House of Lords are issued under the Great Seal by the Lord Chancellor on behalf of the Sovereign. Historically speaking, they were originally summoned along with the other so-called Temporal Assistants, including the Judges of the Realm, Barons of the Exchequer of the Coif and the civilian Masters in Chancery, who were included in the ancient *Concilium Regis*. The texts of their writs are similar to those issued at the present day to Her Majesty's judges who are not summoned as Members of the House but who are commanded to attend and give their advice. I should be glad to show copies to the noble Viscount if he wishes.

As to their rights of sitting, speaking and voting, if the noble Viscount would look at Chief Justice Coke's *Fourth Institute*, chapter 1, he will see there laid down that the Temporal Assistants who were summoned to the Upper House of Parliament had no "voices." Standing Order 19 of the House of Lords now provides that:

> "The judges, when summoned to attend the House, are not to speak or deliver any opinion until it be required, and they be admitted so to do by the major part of the House in case of difference."

Although the Law Officers are not mentioned in the Standing Order, I have no doubt that they would, if they attended, be in a similar position to the judges. No record exists showing the exact occasion when one of the Law Officers last obeyed such a writ; but it is almost certain that the writ has not been obeyed since 1742, and very probably the Law Officers had ceased to attend before 1700. No records have been discovered, either in the Parliament Office, the Crown Office or in the Attorney-General's Office enabling me to give the noble Viscount a more precise answer.

Viscount Stansgate: My Lords, in thanking the Lord Chancellor most sincerely for an informative and thrilling answer, may I ask this simple supplementary? Does the fact that these Law Officers receive this Writ of Attendance, which in substance is exactly the same as the Writ of Summons that we receive, disqualify them from sitting in the House of Commons?

The Lord Chancellor: It does not. But I think that the history of this matter is a most interesting commentary on the relations between the Houses, and if noble Lords will bear with me I will explain how the position arose. I hope that I am not trespassing on your Lordships' time.

From the middle of the fifteenth century until the seventeenth century the King's Attorney—or "Attorney-General"—sat on the Woolsack as an Assistant to the House of Lords, where he performed the functions of giving advice when asked and of taking Bills to the Commons. Under Henry VIII he sometimes also assisted in drafting Bills. As late as 1844 it was still theoretically possible for the judges, as Assistants, to be asked to take messages to the Commons. The noble Viscount will find that in the first edition of Erskine May.

By the beginning of the seventeenth century the offices of Attorney-General and Solicitor-General (who was first summoned to the House of Lords in 1809) were very much what they are today. Coke refers to the "King's Learned Councell" among the Temporal Assistants of the House of Lords and distinguishes between the writs (I would emphasise this because I think it deals with the specific point the noble Viscount was making) which call them to attend to give their advice and the writs summoning the barons to Parliament. As I said, it seems that, although they " had no voice," the Law Officers and judges were expected to attend the House. The change which took place during the century was the result of the constitutional change in the relationship between the Houses. A distinction was made between the Attorney-General and the Solicitor-General—a distinction for which, if I may say so, as I have held both offices, there seems to be no good reason, except that the former was the more important figure. But it is clear that although Solicitors-General sat, and even acted, as Speaker in another place in the reign of Queen Elizabeth I, the Commons objected to the Attorney-General doing the same on account of his close association with your Lordships' House. In 1614 Francis Bacon was allowed to sit, but it was resolved that in future no Attorney-General should do so. The prohibition was effective in 1640, but in 1673 Francis North was permitted to sit.

From this time onwards it became normal for the Attorney-General to be a Member of the Commons, although before 1700 at least two (Sir William Jones and Sir John Trevor) were not. It is interesting to note that during this period the judges did not attend your Lordships' House as often as your Lordships' predecessors would have wished, and it is probable that the Law Officers ceased attending altogether. Macqueen's *Practice of the House of Lords*, published in 1842, states at page 46 that " for upwards of a century and a half " the duties of Assistants had been exclusively performed by the judges who, not being permitted to sit in the House of Commons, had no divided loyalty. Macqueen also records that in 1685 it was a Standing Order that neither the Attorney-General nor any other Assistant should be heard at the Bar of this House as counsel for any private individual. From that date it is probable that the Attorney-General preferred to appear as counsel and ceased to act as Assistant—indeed, in 1692 your Lordships petitioned the Crown for the services of Attorney-General Somers as Assistant, but the outcome of that petition is unknown.

The next significant piece of evidence is the Standing Order of 1742 which amended the prohibition of 1685 by limiting it to Assistants who had taken their places on the Woolsack. This Order was still in force in 1844, but is no longer preserved in the Standing Orders of the House of Lords. Order No. VII of the 1936 Standing Orders reads as follows:

> " The learned counsel are likewise to attend on the Woolsacks, but are never covered."

The marginal note to the Order is " King's Counsel." The Parliament Office consider that this Order did not refer to the Law Officers, but they cannot be certain. The 1st Edition of Erskine May, in 1842, deals with all the Temporal Assistants of the House and sets out a Standing Order which is preserved almost exactly in Order VI of 1936, though applied there only to judges and Privy Councillors.

My Lords, it is interesting that at the present day the Attorney-General advises the Committee for Privileges of your Lordships' House. It is arguable whether he then appears as Assistant or as counsel for the Crown. I should think the view which is more widely held is that he appears as counsel for the Crown. But he also advises the Personal Bills Committee of your Lordships' House, and there the old position of Assistant shades off very mildly into the position of counsel for the Crown.

Let me take another example. Suppose that, to the good fortune of your Lordships, I was absent and the Woolsack was occupied by my noble friend Lord Buckinghamshire (I take him as an example because he is a descendant of almost the most famous lay clerk in legal constitutional struggles, John Hampden, in the ship money case), and suppose that during the course of a debate your Lordships wanted to know what was the view of the law which underlay the position taken by Her Majesty's Government. It would still be open to my noble friend Lord Buckinghamshire to ask the Attorney-General to come to the Bar of the House to carry on the view that was taken in about 1700 and to advise your Lordships upon the law. The essential difference is that it has always been an advisory position and not in any way as a Member of your Lordships' House. I apologise for detaining your Lordships for so long, but this is a point of interest to myself, and I hope that my remarks have been not unhelpful to the noble Viscount.

Viscount Stansgate: My Lords, in common, I am sure, with all Members of the House, I am deeply grateful to the noble and learned Viscount the Lord Chancellor. But in that wealth of historical material he has overlooked the question I asked him, which was: does the fact that the present Attorney-General and Solicitor-General both receive writs cause them to be ineligible for a seat in the House of Commons?

The Lord Chancellor: My Lords, I am sorry that in that wealth of historical detail the noble Viscount did not hear my preliminary answer to his question. It was admirably short. It was, No.

Viscount Stansgate: Will the Lord Chancellor explain why it is that these two officers are privileged? Any other Member of the House of Commons who receives a writ to come here thereby, whether he accepts the writ or not, vacates his seat. Why are the two Law Officers excluded from that?

The Lord Chancellor: I have put the point, and I think the noble Viscount will find that it occurs in my original answer and in the enlargement which I gave him. It is because it is a writ summoning them to advise the House, and not to be Members of the House.

Viscount Stansgate: I am sorry, but the Lord Chancellor cannot, I think, have read the two writs. I will read them to him. The first writ is the Writ of Attendance which the Attorney-General receives, which says, " You must attend in your place personally to treat and give your advice." The writ which we receive is, " To treat and give your counsel." In substance, there is no difference whatever between the two, and I should like to know why this disqualification falls on all Members of the House of Commons except these two Law Officers.

The Lord Chancellor: My Lords, the noble Viscount has made the distinction by his own words. The first is a writ summoning them to attend and advise; the second is a writ summoning them to attend and counsel. To everyone who knows the noble Viscount well, especially some who know him as well as I do, it means that when the noble Viscount is summoned to counsel the House he has a voice—and a very powerful voice. The Law Officers have no voice unless they are requested to advise. It would be a terrible detriment to your Lordships' House if the noble Viscount were in the position that he was able to address the House only if your Lordships commanded.

THE RULE OF LAW REVISITED

Poachers turned gamekeepers may be admirable officers for the enforcement of the law. It is, though, to be doubted whether the combination of poachers and gamekeepers is the right body to devise the branch of law with which they are particularly concerned. This doubt is provoked by consideration of some recent devices for formulating constitutional rules, and particularly of the *Report of the Committee of Privy Councillors appointed to enquire into the interception of Communications* (Cmnd. 283). The Report itself is the work of three distinguished Privy Councillors, who, as was only to be expected, discharge their task with thoroughness and impartiality. They themselves declare (§ 38) " We recognise that we have no authority ourselves to decide between these conflicting views " [*scil*: on the origins and justification of the powers in question] " and to declare the law." This attitude is, with respect, the correct one. Yet today it is not an easy one to maintain in practice as well as theory, and it will be a misfortune if, against the background of impartiality of this Report, government decisions accepted in Parliament should be regarded as having any force in law.

There is, today, some tendency to substitute administrative modification for clean reform. Statements in Parliament, such as those on the disclosure of documents by the Crown,[1] are simply sedatives, and they have two dangers. Because there is an alleviation of a particular ill the underlying principle is not cleanly attacked and examined and hence proper reform may be unduly postponed.[2] That may be bad. What is worse is that such statements acquire force, and that force may grow with increased use of the device. Statements such as that referred to become the basis upon which legal advice is tendered, upon which the community works, and thus they inevitably take on the colour of law. It may be said (though this too is doubtful) that the process is harmless enough when the statement extends liberties. The real risk is that the same process may work when such statements contract liberties. To say that governments are not the right bodies to decide such matters is not to cast reflections upon their members. The burdens of office, the honest concern for administrative efficiency in the protection of the State create pressures which would disturb the best of judgments. "In this case," said Lord Atkin, in the most famous of his dissents, "I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." Yet those arguments were advanced on behalf of high-minded Ministers. It is perhaps scarcely more attractive to find modern Home Secretaries, though with very different motives, pleading for the same "prerogative" as was claimed and exercised by Grenville's Ministry in 1763. In such matters, too, Parliament itself may not be the best forum for decision. A system of alternating government means that an opposition can never forget that it has been and will be a government. The report in question makes it evident that "wire-tapping" is a bi-partisan activity. In such circumstances the critical abilities of Parliament are impaired. The changes of role of government and opposition are too frequent not to have their effect, and the poacher may become too ready to see the point of view of the gamekeeper.

No harm is done provided that government declarations are accepted as valueless in law. The arbiters of the legality of a warrant to tap can, in the absence of statute, only be the courts whose members have, as Lord Radcliffe has recently emphasised, an added expertise in justice. That expertise remains important, for there are arguments which may be acceptable in an administrative or Parliamentary setting which carry less weight in courts. Thus at one stage the present report comments (§ 151) "if it is said that when telephone wires of a suspected criminal are tapped all messages to him, innocent or otherwise, are necessarily intercepted too, it must be remembered that there is really no hardship at all to the innocent citizen."[3] Yet the rules of criminal law have not been framed upon that narrow basis. At times it is the protection not of the innocent but of the suspect which governs, at others it is the protection of the innocent citizen which is regarded as paramount. There is perhaps significance in the order of interests set out by Lord Cooper when he said[4] "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts of law on any more formal or technical ground." For reasons which reflect no discredit on Parliament or civil service it is probable that the balance between these principles can best be settled in the courts. It is there, too, that arguments based upon use and wont, which elsewhere may carry weight, were answered and rejected by Lord Camden.[5] The answers of the courts may not themselves receive full weight elsewhere. The contention that the fact that evidence obtained by postal interceptions has been used in court could be used to demonstrate the legality of the power to intercept, was also answered by Lord Camden, as it has been in more recent cases, which show that the question of admissibility of evidence is one entirely distinct from that of the legality of the method of obtaining it.[6] Yet the argument reappears in the Report,[7] and might be accepted elsewhere as much stronger than it is.

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[1] Statement of the Lord Chancellor in the House of Lords, 197 H.L. Deb. 741–748.

[2] The reform of the law of Crown proceedings is an obvious instance where, even after reform, the disadvantages of part makeshift devices still leave their mark.

There is a further practical virtue of the courts. As the cases show, they can adjust their rules to particular cases. The distinction between "revenue" and "security" cases, which overhangs the Report, would in the courts present much less difficulty. Indeed, even the uncertainties of some of the judicial rules may have merit, the merit of keeping authority well within the bounds of law. Dicey, long since, rejoiced that "the general principles of the constitution

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[3] See too § 143 which also seems to be much more narrowly conceived than are similar rules in the criminal law.

[4] *Chalmers* v. *H.M. Advocate*, 1954 J.C. 66 at 78–79.

[5] "To search, seize and carry away all the papers of the subject on the first warrant: That such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law is incredible. But if so strange a thing could be supposed, I do not see how we could declare the law upon such evidence." *Entick* v. *Carrington* (1675) 19 St.Tr. 1030, 1074, quoted in § 24 of the Report.

[6] See, *e.g.*, *Lawrie* v. *Muir*, 1950 J.C. 19 at 26, *Elias* v. *Pasmore* [1934] 2 K.B. 164 and *Kuruma* v. *R.* [1955] A.C. 197.

[7] § 149.

. . . are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts." It is easy to criticise Dicey, but here his remarks might well be borne in mind and clearer distinctions be drawn between the problems of overburdened Ministers and general problems of liberties. Borderline cases, such as the need for the security in the civil service will no doubt exist, but even here, and even amid the pressure of present alarms, the substantial merits of Dicey's principle might well be remembered. On grounds of principle, as well as for practical convenience, it is desirable that, in this context, it should be kept clear where and how our constitutional rules are to be formulated.

J. D. B. MITCHELL.

ADMINISTRATIVE JUSTICE AND INJUSTICE: A COMMENTARY ON THE FRANKS REPORT

William A. Robson

The Franks Committee is the first inquiry into our system of administrative adjudication which has taken place for a quarter of a century. Much water has flowed under the bridges, and a lot of ink has flowed from fountain pens, since the Donoughmore Report was published in 1932. An immense growth has taken place in the number, variety and scope of administrative tribunals; and public inquiries have become a much more widely used and important instrument of government. The powers of the executive have increased in almost every direction either steadily or by leaps and bounds.

The Changed Climate of Opinion

Politicians have at last become aware of the need to safeguard more effectively the individual citizen in his dealings with the State. Conservative opinion, which in the past had shown blind and unfailing confidence in the ability of the courts to establish and maintain a genuine system of administration according to law, has recently shown signs of distinct uneasiness at the difficulties which for various reasons often make it impossible to secure judicial review of executive action in the ordinary courts. The Crichel Down affair triggered off a revolt from the Right at the helplessness of the citizen who seeks redress from arbitrary or unfair action by a Department. "The Rule of Law" was a far from complacent pamphlet.

The posture of the Labour Party has also changed. The party's commitment to central economic planning and regulation, the nationalisation of industry, a vast development of the social services, and the general policies of the Welfare State and Socialism, have predisposed Labour supporters to regard a strong executive armed with extensive discretionary powers as necessary for the realisation of their objectives. Neither the leaders nor the rank and file of the party had appreciated that the greater the powers which are given to public authorities, the more essential does it become to safeguard the citizen against their harsh or improper exercise. Most Labour

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politicians have assumed until recently that the elected representatives of the people in Parliament or on local councils would suffice to protect the citizen in his unequal contest with great public authorities. Indeed, some leading members of the party openly stated that Crichel Down was a pretext put forward by their political opponents in order to discredit and reverse the policies of the Welfare State. The first glimmering sign of uneasiness at this attitude was Mr. R. H. S. Crossman's Fabian pamphlet bearing the title "Socialism and the New Despotism" published in 1956.[1] In it he declared that "the growth of a vast, centralised State bureaucracy constitutes a grave potential threat to social democracy. The idea that we are being disloyal to our socialist principles if we attack its excesses or defend the individual against its incipient despotism is a fallacy." A great deal of what Mr. Crossman wrote would have been acceptable to the late Lord Hewart.

Very belatedly the Fabian Society turned its attention to the problem emphasised by Mr. Crossman[2]; and the Labour Party subsequently devoted one of its policy pamphlets to the subject of *Personal Freedom*. This pamphlet adopted the main recommendations of the Donoughmore Report.

Thus, the climate of opinion had changed to the extent that both the political parties had become increasingly conscious of the problem of executive justice and injustice, and anxious that something should be done about it. It was against this background of a widespread desire for reform that we must see the appointment of the Franks Committee and the results which have flowed from their work.

THE TERMS OF REFERENCE

The Franks Committee were not authorised to inquire into the whole realm of administrative justice. Their terms of reference charged them with considering and making recommendations on (a) the constitution and working of tribunals, other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions; (b) the working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as a result of objections or representations, and in particular the procedure for the compulsory purchase of land. The Committee interpreted these terms to mean that they were precluded from considering the vast mass of departmental decisions in which no formal procedure is prescribed. Many of these decisions are made by Ministers in the exercise of judicial powers, and they relate to disputes between a citizen and a public authority. These further decisions, as the Committee called them, do not involve either a hearing by a tribunal or a public inquiry.[3] It may therefore be thought, they said, that in these cases "the individual is less protected against unfair or wrong decision."[4] But however that might be, the deplorable fact is that such matters lay outside the Committee's ambit. In consequence the Crichel Down affair, which the Committee themselves said was generally regarded as being a principal motive for their appointment, lay entirely outside the subject-matter of their investigation,[5] because the Crichel Down inquiry had no statutory foundation.

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[1] The pamphlet was based on a lecture given by Mr. Crossman to a Fabian audience in November, 1955.

[2] See *Justice and the Administration*, by Gordon Borrie. Fabian Research Series, No. 185. March, 1957.

In consequence of these narrow terms of reference the Franks Committee felt unable to consider my own proposal for an administrative appeal tribunal with jurisdiction not only to hear appeals from tribunals or from the decisions of Ministers following public inquiries but also cases where a public authority prima facie appears to have acted in an unduly harsh, unjust or improper manner, or to have shown a lack of reasonable consideration to the interests of any person or persons. The Committee did, however, express their sympathy with the desire to provide machinery for hearing appeals against administrative decisions generally.[6]

It is unfortunate that the Franks Committee should have been so very narrowly confined by their terms of reference. The Donoughmore Committee were hamstrung to an even more marked extent by their terms of reference. It would be a good thing if the terms of reference of Royal Commissions and Departmental Committees were submitted in draft form to Parliament for debate and criticism before being finally settled. The scope of an inquiry is surely a matter on which parliamentary and public opinion should have an opportunity to express its views before the final decision is made.

THE PURPOSE OF ADMINISTRATIVE TRIBUNALS

With these general considerations in mind we can turn to a detailed examination of the conclusions and recommendations of the Committee.

The Report begins with an analysis of the motives and implications underlying the growth of administrative tribunals. They were set up to remove certain types of controversy or dispute from ordinary departmental decision on the one hand and from the jurisdiction of the regular courts on the other. We must infer that the aim was to promote good administration; understanding by this the making of decisions which strike a reasonable balance between prompt and effective action in carrying out public policy and due consideration for the interests of individual citizens. The Committee attributes this highly meritorious aim to Parliament; and of course in constitutional theory and in law all legislation is the exclusive handiwork of Parliament. But in fact, as we know, the statutory provisions creating administrative tribunals or requiring public inquiries were all initiated by Ministers and their Departments in consultation with Parliamentary Counsel. I know of no example when either House induced the Government to introduce a provision of this kind into a Bill. So let us not imagine that the legislature has imposed virtuous conduct on reluctant Governments; for such a view is quite incorrect. Parliament has indeed until recently displayed a conspicuous and prolonged indifference to this whole subject for several decades. If it had not, the present position would doubtless be much more satisfactory in several respects than it is.

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[3] Report of the Committee on Administrative Tribunals and Enquiries, H.M.S.O., Cmnd. 218, 1957, paras. 11–12.

[4] *Ibid.*, para. 14.

[5] *Ibid.*, para. 15.

[6] *Ibid.*, paras. 120–121.

If we are to be realistic, however, one should add that in establishing administrative tribunals Ministers were not always seeking only good administration. Sometimes they were seeking a device which would afford them immunity from responsibility to Parliament for certain kinds of decision. The establishment of an administrative tribunal to which judicial decisions can be referred is one of the easiest and most popular methods by which ministerial responsibility can be avoided. At the same time, we must recognise that this desire on the part of Ministers to divest their Departments of responsibility for the exercise of judicial powers has often arisen from an apprehension that if the decision lay with them they might be exposed to pressure from many different quarters in regard to particular cases. To guard against this possibility can, however, be regarded as an aspect of good administration.

OPENNESS, FAIRNESS, IMPARTIALITY

The Committee inferred from the legislation establishing administrative tribunals that the motive was not merely to promote good administration but to ensure that the questions referred to them were determined in accordance with the principles of openness, fairness and impartiality.[7] These principles will receive general support as guides to the conduct of administrative justice. But one cannot regard the need for them as explaining the growth of administrative tribunals. There were many other influences at work. The tribunals are an alternative not only to direct ministerial decision but also to determination by the courts. The courts certainly manifest openness, fairness and impartiality, yet they were not chosen. The reasons for preferring administrative tribunals are generally known by now and accepted—speed, flexibility, cheapness to the parties, simpler procedure, informality, a knowledge of the subject-matter, and the need to infuse decisions with public policy to an extent which would be impossible in the courts, have all played a part in the movement. What do these principles mean in practice? Openness requires that the proceedings shall be conducted in the full light of publicity and that tribunals shall give the reasons for their decisions. There are some exceptions to the rule that publicity should prevail, as for example where intimate personal circumstances are disclosed to the General and Special Commissioners of Income Tax, or to the National Assistance Tribunals; or where questions of national security are under discussion. In the case of allegations against doctors and other persons participating in the National Health Service, the Committee thought that the initial proceedings before a Service Committee should continue to be private but that any subsequent proceedings on appeal should be held in public.[8]

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[7] *Ibid.*, para. 41.

Fairness requires the adoption of a clear procedure designed to enable the parties to know their rights; to present their case fully; and to know the case they have to meet.

Impartiality they declare to mean that administrative tribunals shall be free from the influence, real or apparent, of the Departments responsible for the service or subject-matter of their sphere of work.[9] This would be an impossible principle if it were taken literally in the unqualified form in which it is stated in the Report. What is both possible and desirable—and, indeed, generally observed today—is that a Government Department shall never attempt to influence the decision of a tribunal in a particular case; nor seek to guide or direct the decisions of a tribunal generally, or of a particular set of tribunals, by secret or informal backstairs methods. The only permissible means is by general rules or principles laid down by statutory instrument or by some other formal public document.

There was no suggestion in the evidence given to the Committee that Government Departments have either influenced or attempted to influence members of tribunals. Nevertheless, the Report displays uneasiness that Ministers should have the power to appoint so many chairmen and members of tribunals deciding matters affecting their Departments.

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[8] *Ibid.*, paras. 76–81.

[9] *Ibid.*, para. 42.

THE "RECEPTION" OF ADMINISTRATIVE JUSTICE

The Franks Committee recognise that administrative tribunals have now become a permanent part of our constitutional system; and that they are, moreover, likely to become of increasing rather than diminishing importance. Hence, the standard of their work must have a substantial impact on the general level of adjudication in this country.

This acceptance of administrative tribunals as a valuable and permanent part of the machinery of justice is an important landmark in our constitutional history. The Franks Committee has gone much further in this respect than the grudging admission of the advantages possessed by tribunals accorded by the Donoughmore Report. This is a welcome sign of the more intelligent and balanced outlook which is found in contemporary opinion on the subject. But the Franks Committee also insist that although tribunals are distinct from the ordinary courts, they are not to be regarded as mere appendages of Government Departments. They reject the view implicit in much of the evidence tendered by senior civil servants that tribunals form part of the machinery of administration for which the relevant Government Departments must be responsible. In the Committee's view "tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration." [10] The real significance of this attitude is that it represents the "reception" of administrative justice into the general system of adjudication.

There are, however, some serious consequences of this "reception." The Committee point out the advantages of a right of appeal; and advocate as the ideal arrangement a general appeal on fact, law or merits from a tribunal of first instance to an appellate tribunal. An appeal should not lie from a tribunal to a Minister, as it does, for example, in the case of decisions unfavourable to a doctor or dentist reached by the National Health Service Tribunal, or the many appeals decided by the Minister of Transport and Civil Aviation.

Over and above this appeal to a higher tribunal the Committee recommend that every decision of an administrative tribunal should be liable to a further appeal to the courts on points of law.[11] The only exceptions to this are the National Insurance Commissioner, the Industrial Injuries Commissioner, and the National Assistance Appeal Tribunals, whose decisions are to be subject to review by certiorari. The jurisdiction of all administrative tribunals is to be open to challenge in the courts by certiorari or prohibition.[12]

[10] Para. 40.
[11] Para. 105.
[12] Para. 107.

A fundamental weakness of the Report is that while the Committee quite properly scrutinise with critical eyes the composition, powers, procedure and activities of administrative tribunals, they appear to assume that where the ordinary courts and the legal profession are concerned it may be taken for granted that everything is entirely satisfactory. There is not a word of discussion, let alone criticism, in the Report about the training or education of lawyers, the procedure of the courts, or the high cost of litigation. Yet legal education is bound to have a vital bearing on the merits of lawyers as chairmen of tribunals or as counsel for the parties appearing before them; while the costs of litigation and the procedure of the courts are highly relevant to the question whether it is wise to give a general right of appeal on points of law. The Committee does not turn a blind eye to such matters; it does not look in that direction at all.

Many people who read the Report will have little idea of the obscurity and difficulty which surrounds the phrase "a point of law." It has never been defined and is probably incapable of definition. But with the aid of a competent lawyer a very high proportion of decisions are capable of being appealed against on "a point of law," since this means in practice finding grounds of objection to the decision to which the court will listen—including the question whether there was any evidence on which the tribunal, properly directing itself on the law, could have arrived at the decision which it reached.

The Committee accepts the *status quo* in an uncompromising manner so far as the courts are concerned. They rejected my proposal for an Administrative Appeal Tribunal separate from the ordinary court system. They also rejected the proposal put forward by the Inns of Court Conservative and Unionist Society for an Administrative Division of the High Court, a proposal which was supported from a somewhat broader point of view by Sir Carleton Allen, Q.C.[13] They made no recommendations about the need for a specialised Division of the High Court to deal with administrative matters. They expressly urge that the existing remedies by way of orders for certiorari, prohibition and mandamus, shall continue unchanged.

One may concede that the proceedings of administrative tribunals should be liable to be reviewed and their decisions quashed by the courts if it can be shown that the members of the tribunal did not hear the case with an open mind or had prejudged the issue; or that they had exercised their powers to promote unauthorised purposes; or had been influenced by improper motives of extraneous considerations. To go beyond this and to provide for a general right of appeal

[13] Appendix I to the Minutes of Evidence, pp. 3–4.

to the courts on points of law is quite another matter. How can the recognised advantages of administrative tribunals be maintained if an appeal from their decisions involves the citizen in the expense, the complexity, the lack of expert knowledge, and the elaborate procedure of the ordinary courts? And is an appeal to the courts to run from the High Court to the Court of Appeal and finally to the House of Lords? These questions will have to be squarely faced sooner or later unless most of the benefits derived from adjudication by administrative tribunals are to be lost or diminished in those cases where an appeal on points of law is made to the courts. It would be most unfortunate if only Government Departments, wealthy individuals, or firms, and persons financed by the richer trade unions are able to take advantage of the right of appeal to the Courts. Mr. Butler, explaining the Government's attitude towards the Franks Report in the House of Commons, seemed dubious about the matter and said that further consideration would be needed to see how the recommendation would be applied in different types of case.[14]

AN ADVISORY COUNCIL ON ADMINISTRATIVE TRIBUNALS

A notable feature of the Report is the recommendation that a Standing Council on Tribunals shall be appointed by the Lord Chancellor and report to him. The Committee were good enough to say that they were indebted for this proposal to the evidence of Mr. H. W. R. Wade and myself. Mr. Wade proposed an administrative court which would lay down rules of procedure for particular tribunals, and possibly hear complaints that procedural standards had not been observed. I suggested a Standing Council on Administrative Tribunals to report to the Prime Minister or the Lord President of the Council. The Council would have two main functions. First, to consider and report on the remuneration, qualifications, conditions of appointment, tenure, and so forth of members of administrative tribunals and to consider proposals by Ministers to appoint and dismiss the members. Second, to keep administrative tribunals under review and to consider all proposals to establish new ones, to amalgamate or abolish existing tribunals or to change their jurisdiction. It would also draw up or approve rules of procedure and regulations applying to administrative tribunals.

Sir George Coldstream, the Permanent Secretary to the Lord Chancellor's Department, favoured the Chancellor of the Exchequer as a more appropriate Minister than the Lord Chancellor to sponsor the Council on Administrative Tribunals. He gave three reasons for his view. First, because the Chancellor of the Exchequer is head of the Department which is the co-ordinating authority for all Departments. Second, because many large organisations such as the T.U.C and the Citizens' Advice Bureau would prefer a less legalistic approach than that of the Lord Chancellor and his Department. And third, the Lord Chancellor has no jurisdiction over Scotland. He also remarked that " the Departments pay a great deal more attention to the Treasury than they do to the Lord Chancellor's office." [15] Sir Norman Brook, Head of the Home Civil Service and Joint Permanent Secretary to the Treasury, urged that the Prime Minister should appoint the Council and receive its report, because he is ultimately responsible for machinery of government questions, possibly in his capacity as First Lord of the Treasury. The Franks Committee, however, took its own line by recommending that the Standing Council should be appointed by and responsible to the Lord Chancellor. They did this in order to stress that the tribunals are now part of the machinery of justice.

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[14] Parliamentary Debates, House of Commons, Vol. 575, No. 158, Oct. 31, 1957, col. 407.

So far as the composition of the Council is concerned, the Report contemplates a small body of nine or ten persons, partly lay and partly legal, with the lay element predominating. The chairman should be a man who has achieved distinction in public life and he need not be a lawyer.[16]

The duties which the Committee recommended should be performed by the Standing Council are extensive and diverse. They would advise how the general principles regarding the constitution, organisation and procedure contained in the Franks Report should be applied in detail to the various tribunals. They would keep all administrative tribunals under review and be asked to give their advice before any new tribunal was set up. They would consider and advise on the remuneration, the tenure of office, age-limits and similar matters concerning the members of administrative tribunals. They would advise on the duties and conduct of clerks to tribunals. They would formulate detailed rules of procedure for the tribunals; and also a code or codes of procedure for inquiries. They would consider the basis on which " reasonable costs " should be assessed. They would advise if a further appeal from the Independent Schools Tribunals (which are at long last soon to be set up) is required.

In the debate on the Report which took place in the House of Commons on October 31, 1957, several speakers from both sides of the House remarked that the proposal for the Lord Chancellor's Council on Tribunals is the most important recommendation in the Franks Report. Mr. Butler, in expounding the Government's policy, gave it pride of place as the biggest and most important recommendation. One council and not two will be set up, for specifically Scottish problems will be dealt with by making the Lord Chancellor and the Secretary of State for Scotland jointly responsible for the appointments, with a separate Committee for Scottish affairs. The Government accepted the general conception of the Council's functions set out in the Report with one exception: namely, that it should take over the power to appoint the members of administrative tribunals. They felt that this would conflict with the responsibilities of Ministers to Parliament. Therefore, Ministers would continue to make the appointments but would do so after consultation with the Council. The Attorney-General in winding up the debate explained that the Council's functions would be advisory and not executive.

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[15] Minutes of Evidence, Twenty-fourth day, p. 1,105.

[16] Chap. 11.

THE PERSONNEL OF ADMINISTRATIVE TRIBUNALS

The Franks Committee reported that from the evidence they had received the quality of the members of administrative tribunals is broadly satisfactory. They also stated that there was substantial agreement among witnesses that at any rate the majority of chairmen should have legal qualifications. They therefore recommended that chairmen should normally have legal qualifications but that persons not possessing legal qualifications might serve as chairmen if they were particularly suitable.

The reason given for this view is that a legal training is most likely to secure an objective approach to the handling of cases and the finding of facts. This is probably true. But are these the only, or even the principal, qualities needed in a chairman? My own experience extending over many years as chairman of several different types of tribunal, as an arbitrator appointed by Ministers to decide disputes arising in local government, and as a referee deciding old age pension appeals, does not lead me to that conclusion. I think that a real understanding of the social service (or whatever may be the sphere of public administration with which the tribunal is concerned), an insight into the motives and purposes of the legislation—obtained not from a mere reading of the statutes but from a much more intensive study—is of the first importance. In the second place, it is enormously important that the tribunal should be able to make an applicant (who often appears in person and is frequently inarticulate) feel that his case is being considered with sympathy and understanding. This is not a matter of mere informality in the proceedings, but of a human approach to the questions in issue—and this need not and should not involve any undue stretching of the law or regulations in favour of the applicant. And thirdly, the chairman must be able to secure and hold the confidence of the other members of the tribunal. He must be able to discern their point of view towards a case sometimes even before they have expressed it; he must avoid giving them an impression that he is superior or aloof; and he must not attempt to be overbearing, even when they raise (as they sometimes do) irrelevant points.

None of these qualities are necessarily inculcated by a legal training; but some lawyers possess them in a high degree. I feel that the Committee's conclusions on this matter were both conventional and superficial. And much of the evidence on matters of this kind was of doubtful value. The Bar Council, for example, urged that the chairmen should be lawyers, but they are scarcely disinterested. On the other hand, one of the striking features of the evidence submitted by Government Departments was the very slight knowledge possessed by the senior civil servants who appeared before the Committee of how the tribunals associated with their Departments really work. Most of the Permanent Secretaries had never attended a meeting of a tribunal, or had only looked in at one or two sessions.

Mr. Butler, the Home Secretary, said in the House of Commons that while the Government agreed that for the most part it is desirable for the chairmen of tribunals to have legal qualifications, they saw no reason why any serving chairman who is not so qualified should be dismissed if he is giving satisfactory service. Nor do the Government wish to preclude some chairmen who are not lawyers from being appointed as chairmen of administrative tribunals in future. Mr. Butler informed the House that the Minister of Pensions and National Insurance had asked him to state that a large number of National Assistance Tribunals have non-legal chairmen, and that they are carrying out their duties very well.[17] "We have to strike a proper balance between these considerations," he said. I share this view. *Ceteris paribus* I should prefer a chairman with a legal training. But *ceteris* are not always *paribus*, and I should prefer a lay chairman with the qualities I have indicated than a solicitor or a barrister without them.

PROCEDURE

Many of the witnesses appearing before the Franks Committee on behalf of unofficial organisations displayed a great interest in procedure; and some of them were critical of existing practices. The Report discusses procedural questions at some length, although they deliberately left much of the detail to be worked out and applied by the Lord Chancellor's Council on Tribunals.

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[17] Parliamentary Debates, House of Commons, Vol. 575, No. 158, Oct. 31, 1957, col. 406. See also the Memorandum of the National Assistance Board in Appendix II to the Minutes of Evidence of the Committee, p. 161. The N.A.B. stated that "the qualities required in a chairman of one of these tribunals include a knowledge of working class conditions, an orderly mind, and a sense of fairness, possession of which he ought to be able to communicate to the kind of people appearing before him. These qualities are not confined to lawyers." But they would prefer a lawyer to a layman if both possessed them.

The Committee rejected the idea of a single uniform code similar to that contained in the American Administrative Procedure Act. They also rejected the notion of a small number of codes on the ground that there are many different types of administrative tribunals serving a great variety of purposes. The case for differentiation of procedure according to the needs of each type of tribunal is overwhelmingly strong. In consequence, the Committee favoured flexibility rather than uniformity or procedure.

But they did demand a definite procedure to be laid down by statute or statutory instrument for every tribunal. They were in favour of retaining the atmosphere of informality which characterises administrative tribunals, but felt it has sometimes been achieved at the expense of an orderly procedure. They consider that the two aims are not incompatible and that it is possible to combine "a formal procedure with an informal atmosphere." [18]

The main recommendations of the Committee regarding procedure are that in a few instances more care should be taken to see that citizens know in good time before the hearing the case they will have to meet; that the documents relating to cases should be clearly designated as documents of the tribunal and not as emanating from a Government Department; that an adequate opportunity should be given to the parties to attend the hearing; that with a few exceptions the hearings should be held in public; that witnesses should enjoy absolute privilege, especially when evidence is given on oath; that tribunals should be empowered to administer the oath, though it is seldom necessary to do so; that tribunals should have the right to subpoena witnesses and compel the production of documents; that parties should be permitted to question witnesses directly and not merely through the chairman; that the whole system of costs should be looked into by the Lord Chancellor's Council on Administrative Tribunals with a view to ensuring that successful applicants receive a reasonable allowance for their expenses; while in the sphere of the social services even unsuccessful applicants should be awarded expense allowances save when the dispute is between private persons such as those which go before the Rent Tribunals; that decisions should be as full as possible and give reasons for the determination; and that the tribunal should promptly furnish the parties with a notice in writing of the decision, the findings of fact on which it is based, and the reasons for the decision, together with information about the right of appeal.[19]

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[18] Report, para. 64.

The Committee further recommend that the higher appellate tribunals should publish selected decisions and distribute them among tribunals of first instance.[20]

On the question of legal representation, the Report points out that the restriction against an applicant being represented by counsel or solicitor is exceptional so far as administrative tribunals are concerned. They do not believe the prohibition causes much hardship in practice; but they feel that it is wrong in principle to preclude lawyers from having a right of audience before these tribunals and accordingly they recommend the removal of the ban save in the most exceptional circumstances.[21]

THE ORGANISATION OF TRIBUNALS

The Franks Committee were ready to recommend a great deal of tidying up in regard to the procedure and practice of administrative tribunals. They were not prepared to consider favourably any proposals for reorganising on more systematic lines the vast medley of tribunals which have come into existence in a quite haphazard way during the present century.

A number of proposals for amalgamating tribunals were put forward with this in view by several witnesses. The Society of Labour Lawyers, for example, wished to transfer the jurisdiction of the National Assistance Appeal Tribunals and the Pensions Appeal Tribunal, together with the judicial powers of the Minister in regard to questions of contributions and insurability, to the tribunals dealing with national insurance. The National Health Service Tribunal would hear appeals from the Medical Practices Committee and from the service committees; and the latter would absorb the judicial powers of the local medical committees. Appeals from the licensing authorities regarding public service vehicle licences would go to the Transport Tribunal instead of to the Minister of Transport and Civil Aviation. The work of the Agricultural Land Tribunals, the Local Valuation Courts, the London Building Tribunal, the General Claims Tribunal, Rent Tribunals, the Land Tribunal in cases of first instance, and that of certain arbitrators determining questions of rent, compensation, etc., under the Agricultural Holdings Act, 1948, and the Public Health Act, 1936, would be merged in a new set of County Land Tribunals, with a right of appeal to a single Lands Appeal Tribunal. A new tribunal would be established to decide all matters of compensation other than that arising out of the purchase of land.

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[19] Report, paras. 71, 73; Chaps. 8 and 9.

[20] Para. 102.

[21] Para. 87.

I also submitted some far-reaching proposals for the amalgamation of tribunals based on general principles.

The Committee were not willing to entertain these or any general proposals for amalgamation (with one exception), although they expressly stated that they did not regard amalgamation as undesirable. Their attitude appears to have been due partly to a fear that if the tribunals were given a wider jurisdiction they would need full-time service, at least for the chairmen; and that some of the expertise which now exists would be lost or reduced. In view of the emphasis placed by the Committee on the possession by the chairmen of legal qualifications irrespective of the need for more specialised knowledge or experience, this contention appears somewhat odd. The Committee state that they consider full-time service to be undesirable; but they do not disclose the reasons for their view.

The one amalgamation which the Committee recommended was the abolition of the referees who decide appeals in family allowance cases and the transfer of their functions to the National Insurance Local Tribunals.

The only structural reforms of any importance relate to the National Health Service and the Agricultural Tribunals.

The scales are at present heavily weighted in favour of the doctor in the adjudication machinery of the health service. A decision by the National Health Service Tribunal in favour of the doctor is final, whereas a decision that he should be excluded from the service is subject to a further appeal to the Minister of Health, who must appoint someone to hear the appeal (sitting with an assessor belonging to the same branch of the medical profession as the respondent) and report to him. Even this is not the end of the matter, since the report on the appeal must be referred for advice to a medical or dental advisory committee consisting of the Chief Medical Officer and five other doctors. Where the question in issue is not exclusion from the National Health Service, a complaint against a doctor or dentist is first inquired into by the appropriate service committee, which makes a recommendation to the executive council. The latter then decides what penalty, if any, shall be imposed. A right of appeal from their decision lies to the Minister of Health, who then orders an oral hearing by an *ad hoc* tribunal of three persons, who report to him; but in practice the Minister consults yet another medical or dental advisory committee before making his decision.

The Franks Committee reported adversely on " the present one-sided right of appeal from the tribunal to the Minister enjoyed by the practitioner." [22] They recommended that the right of appeal to the Minister should be abolished and that the National Health Service Tribunal should finally determine the most serious cases involving removal from the service. Furthermore, they urged the tribunal's jurisdiction should be enlarged to enable it to hear appeals in the less serious cases. These are at present decided in the first instance by the Executive Councils with an appeal to the Minister.

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[22] Para. 204.

This rationalisation and simplification of the adjudication machinery of the National Health Service (which I had proposed in my evidence) [22a] is badly needed and highly desirable. My only criticism of it is that it does not go quite far enough, as it fails to deal with the local machinery, which is confused and over-complicated.

As regards Agricultural Tribunals, the Committee recommended the removal of judicial functions from the County Agricultural Executive Committees and their transfer to new tribunals which would be independent both of the Minister of Agriculture and Fisheries and of the County Committees. The Government have since announced that they intend to repeal the disciplinary powers enacted by the Agriculture Act, 1948. It therefore seems unlikely that the new tribunals will come into existence.

PUBLIC INQUIRIES

We can now turn to the second part of the Franks Committee's terms of reference: namely, that concerned with public inquiries or hearings taking place prior to a Ministerial decision. The device of the public inquiry has a long history in Britain, and could form a highly interesting subject of research. It is now extensively used by the executive for a wide variety of purposes, such as housing, town and country planning, education, and the compulsory acquisition of land.[23]

The Franks Committee considered that the statutory hearing or public inquiry in an administrative matter prior to a decision by the responsible Minister cannot be regarded as purely administrative or purely judicial. It is not purely administrative because a special procedure is laid down by statute which distinguishes the decision from the ordinary run of work carried out in a Government Department, and because this procedure clearly involves some elements of the judicial process. On the other hand, it is not purely judicial because the issue is not determined by applying a body of known rules but must allow for the exercise of a wide Ministerial discretion. If the whole process is regarded as essentially administrative, then the public inquiry cannot play "its full part" in the total process; and the interests of individual citizens may receive insufficient attention.[24] Conversely, if the process is regarded as predominantly judicial, there is a danger that the public inquiry will be raised to the status of an adjudicating tribunal; whereas its true purpose is to inform the Minister, to serve as his eyes and ears, in order that his ultimate decision, for which he will be held politically responsible, will be based on a proper appreciation of the facts, circumstances, objections to and probable consequences of the proposal under consideration.

[22a] Evidence, p. 490.

[23] See my article, "Public Inquiries as an Instrument of Government," *British Journal of Administrative Law*, December, 1954.

Most of the evidence which the Committee received from non-official witnesses or organisations tended to stress the judicial aspects of the inquiry. Many of these witnesses contended that the practices generally prevailing do not reflect what they consider to be the essentially judicial nature of the process. "From the point of view of the citizen what begins in many ways like an action at law, with two or more parties appearing before a judge-like inspector and stating their case to him, usually in public, is thereafter suddenly removed from public gaze until the Ministerial decision is made. Often the main factors of an inquiry seem to have counted for little in the final decision. New factors—they may have been considerations of broad policy—have come in so that the final decision does not seem to flow from the proceedings at the inquiry."[25] On the other hand, most of the Departmental witnesses urged very strongly that the inquiry is only a step, and not always the most important step, in a chain of events leading to an executive decision by the Minister, who must often take into account administrative and political factors which may play no part in the inquiry.

The Franks Committee wisely decided not to accept either the administrative or the judicial conception of these inquiry procedures, but to endeavour to find a reasonable balance between the administrative needs of Ministers and their Departments on the one hand and the interests of citizens whose rights or property are threatened or interfered with by the Government on the other. They fully recognised the public interest underlying the various forms and occasions of State intervention with private property, and the Report makes no attempt to restore to the property owner the absolute rights he enjoyed in the nineteenth century. At the same time they do not believe that the political responsibility of Ministers to Parliament is sufficient by itself to ensure fair administration in all instances.

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[24] Report, paras. 272–273.

[25] Report, para. 275.

A STATEMENT OF POLICY TO BE PROVIDED

Fairness, as we have seen, requires that anyone whose interests are threatened should know before an inquiry opens the case he will have to meet. At present, no one outside the Department concerned has any knowledge of what one may call the frame of reference within which the inspector holding an inquiry is working. If a local authority or a Department want to acquire my land compulsorily, neither I nor any other member of the public has any means of knowing what I must prove in order to defeat the proposal. I may put forward contentions which appear to me very convincing; but there is no way of knowing if they are relevant in the eyes of the Inspector and his superiors in the Department. This cannot be right or reasonable, and the Committee have made a determined effort to change it.

The Report recommends that before an inquiry is held the acquiring or planning authority should be obliged to provide a full statement of their case in writing.[26] Even more important is the recommendation that the Minister who is empowered to make the decision should supply a statement before the inquiry of the policy of the Government in relation to the matter under consideration.[27] This should provide a frame of reference for the proceedings which at present is completely lacking. If Government policy changes after the inquiry has been held, the Minister would notify the persons concerned when informing them of his final decision. The Minister should be permitted to direct that the whole or part of his policy statement shall not be discussed at the inquiry, but merely accepted as basic data.[28] This exclusion could be abused if it were used in such a way as to prevent objectors from putting their case, and in that event the matter would have to be raised in Parliament. These very important recommendations have been accepted in full by the Government.[29]

THE STATUS OF INSPECTORS

The Committee next considered the status of Inspectors appointed to hold inquiries. Here their object was to give them a greater degree of independence of their Departments than they at present enjoy. With this in view the Committee advised that Departmental Inspectors should be placed under the control of the Lord Chancellor in England, and the Lord Advocate in Scotland. This proposal has not been accepted by the Government; but they have conceded that Ministers will consult the Lord Chancellor before appointing

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[26] Para. 281.

[27] Para. 287

[28] Para. 288.

[29] Parliamentary Debates, House of Commons, Vol. 575, Oct. 31, 1957, Mr. Butler, col. 409.

Inspectors to their staff and will dismiss them only with his consent. Where Departments appoint outside persons to hold inquiries (the normal practice of the Ministry of Education), they will not be affected by these requirements.

THE INSPECTOR'S REPORT TO BE PUBLISHED

Needless to say, a vast amount of discussion took place before the Committee on the burning question of publishing the Inspector's report. This has been a highly controversial matter since the Donoughmore Committee sat; and judging by the inflexible opposition to publication displayed by Dame Evelyn Sharp on behalf of the Ministry of Housing and Local Government, and her frequent reiteration of the embarrassment which publication would cause Ministers, one might have thought that the whole future of the British system of government depended on the preservation of the secrecy which now exists. Nearly all the senior civil servants, including the Treasury Solicitor, the Permanent Secretary to the Lord Chancellor's Department, and the Permanent Secretary to the Ministry of Transport, were against publication, although for different reasons. The Treasury Solicitor felt it would " tilt the procedure too far in the direction of giving responsibility to the Inspector, who cannot be judge of the wider issues of policy, and taking it away from the Minister answerable to Parliament."[30] Sir George Coldstream thought that an objector who knew that he had obtained a favourable decision from the Inspector which was subsequently overruled by the Minister would in the end have a stronger sense of grievance than he would have had if he knew nothing of the Inspector's report. The Ministry of Education, however, has for long made a practice of publishing the reports of its Inspectors, who are independent persons, on inquiries relating to the acquisition of land for schools. Most of the unofficial witnesses felt very strongly on the need for publication. Professor Lawson went so far as to say that no good case has ever been made out for withholding the reports.

The Committee recommended that the complete text of the Inspector's report should be available on request and should be sent to the parties with the Minister's letter of decision. The Inspector should include in his report his finding of the facts and the inferences to be drawn from them, the policy considerations involved, and wherever possible his recommendations to the Minister. The Government have accepted this proposal except where a Service Department seeks to acquire land. In such a case the inquiry will be held in private, and the report of the Inspector, who will be appointed by the

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[30] Franks Committee, evidence, p. 242.

Lord Chancellor, will not be published. Thus ends, in a most satisfactory manner, a controversy in which Departments have been quite unnecessarily striving to maintain secrecy. I do not believe that public administration will suffer in any way from this change, which will do much to satisfy the feelings of interested citizens and their advisers. Ministers will now have to give, as they usually have done hitherto, a statement of the findings and inferences of fact and a reasoned decision.[31] But in future, if they differ from the Inspector's report, a reasoned justification will be needed. The Minister will also be obliged to submit to the parties for their comments any factual data or expert advice, whether obtained from his own Department or from other sources, which come to him after the inquiry is ended.[32]

These are the major proposals. Space forbids any discussion of the minor ones, although some of them are valuable. I would, however, particularly mention the recommendation that the initiating authority should always be required at the outset of a public inquiry to explain fully their proposals and to support them by oral evidence.

CONCLUSION

In conclusion, I will indicate what the Report of the Franks Committee and the prompt acceptance by the Government of most of its recommendations appear to have achieved.

First, it has made clear beyond the shadow of a doubt that both administrative tribunals and public inquiries are a permanent, valuable and accepted part of our system of government. They are, indeed, "essential to our society." [33]

Second, the Report has laid down the general principles which should govern the procedure of tribunals and inquiries. These are admirable and will command widespread agreement.

Third, the Report has led to the creation of a permanent focus of interest, knowledge and scrutiny concerning administrative tribunals and public inquiries in the shape of the Lord Chancellor's Council on Administrative Tribunals. This should gradually improve the position in many different ways and raise the level of the weaker tribunals to that of the best examples. It should also in course of time lead to greater consistency and system in a sphere in which their absence is at present conspicuous.

Fourth, the Report has laid down a uniform system of appeals both to higher tribunals and the courts. On no previous occasion has this been attempted.

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[31] Para. 352.
[32] Para. 350.
[33] Para. 406.

Fifth, the Report seeks to integrate administrative tribunals with the regular courts by means of the appeal on points of law and with the legal profession by means of legally qualified chairmen and the right of legal representation.

Sixth, the Report secures to a substantial extent the severance of administrative tribunals from the Departments with which they are associated. It achieves this by removing the appointment of chairmen from Departmental Ministers and by requiring the Minister to consult the Lord Chancellor's Council on many different matters.

Seventh, it breaks down much of the mystery-mongering which has hitherto surrounded public inquiries and forces the decision-making process in Departmental administration to come into the light of day. It removes " policy " from the realm of the unknowable to the sphere of the ascertainable.

These are no mean achievements, whether one agrees with all the recommendations or not; and Sir Oliver Franks and his colleagues must feel well satisfied with their work. But much still remains to be done. In particular, there is no indication of the principles or relevant considerations which should lead to the establishment of new tribunals or the amalgamation of existing ones. The judicial powers of Ministers have escaped scrutiny and need investigation. And what should be the proper nature and scope of the administrative jurisdiction?

Last and most important, when are we going to consider the methods by which a citizen can be given a reasonable opportunity of securing redress in the event of his being a victim of maladministration which does not infringe his legal rights? Let us hope that the Government and Parliament, in the first flush of their enthusiasm, do not ignore these items on the agenda for another twenty-five years.

THE CIVIL SERVANT—POLITICAL REALITY AND LEGAL MYTH

LEO BLAIR

INTRODUCTORY

IN our present society an increasing number of legal relations are passing from the private to the public sphere, and when the legal security of the individual comes into direct contact with the political power of the State, the problem of reconciling private liberty and public interest becomes most complex.

In recent years, much attention has been devoted to the legal problems arising out of the phenomenal expansion in governmental activity; problems of delegated legislation, administrative justice and the limitation of administrative discretion generally. The difficulty in maintaining a reasonable balance between the needs of the administration and the legal security of the individual has well been described as " the cardinal problem of administrative law." [1]

But for the public lawyer another problem is becoming increasingly important. The extension of the role of government has brought an ever-growing number of people into an intimate relationship with the State as an employer. In the central government departments, the public corporations and local government, the multitude of officials and employees poses a wide variety of questions which have in common the major difficulty that they involve the delicate task of limiting the freedom of the individual employee by virtue of the public nature of his employment.

The questions raised by the demands made by the State of its employees are everywhere becoming more pressing and the answers cannot be framed entirely from the viewpoint of either the political power of the State or the legal rights of the employee. The private interests of public officials must be subordinate to the superior interests of the community for whom the whole system of administration exists. The public interest certainly requires adequate guarantees of just treatment in the relations between the State and its servants; but it also requires effective safeguards for the maintenance of efficient administration.

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[1] Friedmann, *Law and Social Change in Contemporary Britain* (1951), p. 163.

That man in society has social duties and obligations which limit his individual liberty would not be denied by either lawyers or political scientists; that certain types of employment carry additional restrictions on personal freedom is also generally admitted. Public administration is most exacting in its limitations on the rights of its servants and the employment relationship of the public servant differs from that of the private employee in a large variety of ways. The employer has wide powers of control and the exercise of this control is often limited neither by the ordinary legal rights of the private employee, nor, for example, in the United States, even by the "fundamental rights" guaranteed to all citizens by the Constitution.[2] The private conduct of the governmental employee, no less than his official actions, is circumscribed by a multitude of rules and regulations pertaining to, for example, contracts with government departments, gambling, bankruptcy, patents and copyrights and the acceptance of gifts.

This peculiarly restricted legal position is the hallmark of the public servant in most modern States [3] and, moreover, appears to be accepted as right and proper by the public employees themselves.[4] But, inevitably, the question becomes more insistent; what is the justification for imposing upon a large section of the population an employment relationship markedly different from that of the rest of the working community?

Fundamentally, the public interest in government activity is in its efficiency; large sums of money are everywhere required to run the public services of the modern State; most of this finance is, of course, raised by taxation and this large-scale compulsory transfer of funds from the private to the public purse requires that a constant check is maintained on the efficiency of the administrative machine.[5]

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[2] *Cf.* ". . . it is no infringement upon the constitutional rights of anyone for the Board to decline to employ him . . . and it is immaterial whether the reason . . . is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trade union, or whether no reason is given . . ." *People ex rel. Fursman* v. *Chicago*, 278 Ill. 318 (1917) at 326. And see the view expressed by Justice Reed in *U. P. W.* v. *Mitchell*, 330 U.S. 75; 91 L.Ed. 509 at 524, that the fundamental rights guaranteed by the Constitution are not absolutes, but are limited by the responsibility of Congress to provide an efficient public service.

[3] See: *The Legal Status of Staffs of Postal, Telegraph and Telephone Services* (1951), a report prepared for the Postal, Telegraph and Telephone International, Berne. A survey of twelve European countries compiled from a comprehensive questionnaire, this report provides ample evidence of the special legal condition of government employees generally.

[4] Discussing the possibility of introducing "benefits in kind" into the British Civil Service, the Priestley Commission commented: "It was the general view of our witnesses that it was not possible to go further in relaxing the present Civil Service rules. Civil servants work under Ministers; payments were made out of voted moneys; civil servants had to do their business in the light of a good deal of publicity and regard must be had to public opinion . . . differences between the Civil Service and industry had to be accepted." *Report of the Royal Commission on the Civil Service*, 1953–1955, Cmd. 9613, p. 87, para. 373.

Above all, therefore, an analysis of public employment is a study of political institutions, and the public lawyer, no less than the political scientist, must look beyond the formal, legal aspects of these institutions and see them as they actually work. The organs of the State are a blend of the political and the legal. To separate these is impossible and to attempt to study public employment in terms of common law and statute alone is to mistake legal " shadow " for political " substance."

In fact, the political element inherent in public employment has not been ignored entirely either by the courts or the academic lawyer. Implicit in the discussions of " public policy," " public interest " and the like, is a recognition that the problems raised by government employment cannot be resolved by purely legal solutions. The legal approach, however, has been marked by two important characteristics.

First, the emphasis has been laid on concepts more appropriate to private law than to public law. This reluctance to dispense with private law is well illustrated in the desire shown by many writers to maintain " contract " as the basis of the Crown-servant relationship. The contract is somehow envisaged as the ideal means of upholding and protecting the rights of the employee against the arbitrary actions of the State.[6]

But this is to view the problem one-sidedly; from one point of view the public servant's employment poses important questions of the rights of the employee; but from another it raises the (at least) equally important question of the political power of the State—the power to take all necessary action to further the efficiency of the government machine in the interests of the community.

Second, any legal discussion must lay great stress on the abnormal; legal principles are most important when things go wrong. Thus, the legal analysis of the position of the public employee tends to pay excessive attention to the " pathological " situation, the exceptional case where the normal processes have failed to achieve a compromise between employer and employee. Unless this legal analysis is accompanied by some examination of the political and administrative realities which are clearly in evidence in the day-to-day administration of government, the position of the public employee may well appear to be much worse than is really the case. The legal approach to the British civil servant's position, for example, has consistently under-estimated the vital role played by collective agreements made after negotiation between the "staff" and the "official" sides. The parallel in industrial relations is obvious.[7]

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[5] *Cf.* the numerous dicta to this effect in *Roberts* v. *Hopwood* [1925] A.C. 578.

[6] Richardson: " Incidents of the Crown-Servant Relationship " (1955) 33 *Canadian Bar Review*, 459; Beinart, " Legal Relationship between the Government and its employees " (1955) *Butterworth South African Law Review*, 71.

The effect of these two factors, it is suggested, has been to distort the true position of the public employee and, moreover, to necessitate the advancement of legal solutions to problems, many of which would not exist if the realities of the situation were sufficiently taken into account. An analysis of the legal status of the public servant which ignores the daily operation of the internal codes of administrative regulations in public authorities, is in danger not only of being arid, but may well be completely misleading.

Formal solutions like the drafting of precise contracts, enforceable by either party or the provision of guaranteed statutory rights may satisfy the laudable desire of the lawyer to afford legal protection to the public employee. But, such solutions are probably unnecessary and may possibly introduce too rigid a structure into public employment relations.

LAW AND REALITY

Law and reality are often in conflict. In the sphere of industrial law, for example, "the law still reflects a state of affairs which has long ceased to be the norm of practical life"[8] and continues to emphasise the "contract of employment" between the individual employer and employee; no notice is taken of the "collective agreement," which, in fact, is the mainspring of British industrial relations. And the law of equity may be said to have originated in the gap between common law and reality.[9]

The constitutional lawyer is, however, more than usually familiar with what Lord President Cooper called, "the conflict between academic logic and political reality,"[10] and this conflict is nowhere more striking than in the present-day position of the British civil servant.

On the one hand, a study of the civil servant's legal condition suggests that he is in a position at once uncertain and open to

[7] *Cf.* Kahn-Freund, *The System of Industrial Relations in Great Britain* (ed. Flanders & Plegg, 1954), p. 43: "The first duty of a lawyer about to discuss the legal framework of industrial relations is to warn his readers not to over-estimate its importance . . . there exists something like an inverse correlation between the practical significance of legal sanctions and the degree to which industrial relations have reached a state of maturity."

[8] Kahn-Freund, *op. cit.*, p. 50. See, with regard to commercial law, 29 Columbia L.R., p. 121; Dicey, *Law and Opinion*, p. 368, n. 1; and Devlin J., "Commercial Law and Practice," 14 M.L.R. (1951), p. 249.

[9] See, Ashburner, *Principles of Equity*, 2nd ed., p. 21.

[10] *McCormick* v. *Lord Advocate*, 1953 S.C. 396 at 412. The obvious parallel is the famous apophthegm of Lord Sankey L.C. discussing the possibility of the repeal of the Statute of Westminster: ". . . Indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities." *British Coal Corporation* v. *The King* [1935] A.C. 500 at 520.

arbitrary abuse on the part of his employer, the Crown. A glance at his real situation, however, is sufficient to demonstrate that, judged by actual conditions of service, few employees occupy posts of such certainty and with comparable guarantees of fair treatment.

TENURE OF OFFICE

Consider, for example, the question of tenure of office about which much has been written in recent years. In the light of the decisions in *Dunn* v. *R.*[11] and *Terrell* v. *The Secretary of State for the Colonies*,[12] the civil servant is little more than a " tenant at will " of the Crown, liable to dismissal " at pleasure " with no possibility of legal redress. This rule is now well established and the Crown might therefore in normal cases " as a matter of abstract law " dismiss, without cause, any civil servant, at any time[13]; but " that is theory and has no relation to realities."

In the course of his evidence to the Tomlin Commission the Controller of Establishments of H.M. Treasury stated:

> " . . . in fixing remuneration due regard must be had to those other factors in the conditions of employment of civil servants notably security of tenure, prospects of promotion, sick leave privileges, and pensionability." [14]

And in the Report of the Priestley Commission, the Commissioners observe:

> " The State as employer must therefore limit its freedom of action in a way that a private employer need not, to secure . . . immunity from political and personal pressures. This requires . . . that there should be a greater degree of security of tenure than is necessarily found outside . . . " [15]

Further proof of the strength of the tradition of security of tenure, is to be found in the same report where the Commissioners discuss the question of transfers between private enterprise and the civil service and how such transfers could more easily be effected. The Treasury advanced three arguments against easy transfer, the last of which was that " by and large the Civil Service is a career service and transfers should be exceptional rather than frequent."

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[11] [1896] 1 Q.B. 116.

[12] [1953] 2 Q.B. 482.

[13] An obvious exception is the Comptroller and Auditor General.

[14] Report of the Tomlin Commission, Cmd. 3909, Royal Commission on the Civil Service, 1929–1931, para. 305.

[15] Report of the Priestley Commission, Royal Commission on the Civil Service, 1953–1955, Cmd. 9613, para. 98. The Commissioners had already, at para. 17, pinpointed the conflict of law and reality: " . . . it has been held judicially that every contract of service between the Crown and its servants must be assumed to be subject to . . . the term that the Crown may dismiss its servants at pleasure. In practice, however, established civil servants enjoy a very high degree of security of tenure, higher than that normally enjoyed by comparable staffs in industry and commerce."

The Commissioners commented at para. 701:

> " While we should be reluctant to do anything which might make it easier for outside private employers to attract away selected members of the public service and reap the benefit of their training and experience, it was the last point made by the Treasury which seemed to us to have greater weight than many of the other arguments that can be used in discussing this question . . . There could well be a real inconsistency if the State were to provide facilities for transfer to private employment generally when the whole weight of the intention of the rest of its arrangements emphasises the security of tenure which experience has shown to be essential for the effective discharge of the responsibilities of a non-political Civil Service."

This may seem to be labouring the obvious, but there is some evidence that the legal disabilities surrounding civil service employment can seriously mislead those who have either ignored or underestimated the realities of the situation.

In expressing their repugnance at the idea of " dismissal at will," some writers appear to have assumed that the legal rule is an accurate criterion by which to judge the true condition of the civil service.[16] And this excessive pre-occupation with the legal rule to the exclusion of political reality raises at once a dilemma to which no answer framed in strictly legal terms alone is satisfactory.

If the rule of " dismissal at pleasure " is found to be insufficiently justified by the concept of " public policy," [17] then some other basis for the rule must be found—" implied term " for example.

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[16] Professor Street, for example, alleges that " The Crown practice [of reserving the right to dismiss at will] is contrary to public policy because it tends to deceive employees about their rights, and it deprives them of that sense of security essential for the best performance of their duties." (*Governmental Liability*, p. 115.) But it is pertinent to point out that every new entrant to the Civil Service is told: " Every civil servant, established as well as temporary, holds his or her appointment at the pleasure of the Crown, which means that the Crown may dismiss him or her at any moment, without notice and without compensation. That is the legal position; but naturally the Crown does not act in that way without having an extremely good cause for doing so, and it is only if you should be guilty of really serious misconduct that you need be afraid of summary dismissal." (*A Handbook for the new Civil Servant*, H. M. Treasury, 7th ed., 1955, pp. 26, 27.) This would seem to be a reasonable explanation of the true position and can scarcely be described as tending " to deceive employees about their rights." And, from what has been said above, it seems equally unlikely that any member of the Civil Service is deprived of " a sense of security." See Beinart, *loc. cit.* pp. 42, 43; Richardson, *loc. cit.* pp. 429, 430. It is not suggested that Professor Street and others writing in the same vein are not aware that the Civil Service is, in practice, a life career. But it seems to the writer that they are unduly concerned with protection against possible dangers and the risk that Treasury control may cease to be governed by the present standards of morality. It is submitted that such risks must be run and that they are in any case more apparent than real.

[17] *Cf.* Glanville Williams, *Crown Proceedings* (1947), p. 66: " It is quite false to assume that the rule is required by public policy . . . "

Alternatively the law must be changed by formulating into strictly enforceable terms, the incidents of Crown employment; a solution which, it will be suggested, would not be welcomed by the civil service itself.

If, on the other hand, "public policy" is seen as adequate justification for the legal rule,[18] then either the practice of the civil service should be brought into line with the law—an idea which would be rejected by lawyers generally—or the notion of "public policy" is advanced as justifying the rule only within certain very well defined limits.[19]

In truth, a dilemma does appear to exist with regard to tenure of office in the civil service. The need for neutrality and impartiality in the service requires that employees should be more than usually secure; yet the civil servant, by virtue of the public nature of his employment, is closely controlled by numerous rules of conduct—and this close regulation, to be really effective, in the more serious cases, may require the sanction of "dismissal at will."

But it is suggested that the dilemma is, in any case, of little practical importance; once it is accepted that the harshness of the legal rule does not, in fact, exist, then it becomes unnecessary either to find a justification for the severity of the law or to advocate that the law should be changed. Departures of law and practice may often be inconvenient and the existence of the legal rule could obviously accentuate danger, but it is submitted that legal protections in an organisation of long traditions like the civil service are less valuable than the protection afforded by the general standard of employment *mores*.

SALARY

Another aspect of the Crown-servant relationship in which the law and reality conflict is that of salary. The textbook writers are clearly of the opinion that the civil servant has no right to his salary which he could enforce in the ordinary courts of law.[20] The most unequivocal judicial expression of this is the statement of Lord Blackburn in *Mulvenna* v. *The Admiralty*,[21] a statement of the law which was approved in *Lucas* v. *Lucas and the High Commissioner for India*.[22] Much doubt has been thrown on the historical and legal authority for the decisions in these two cases,[23] and recent statements of Lord Chief Justice Goddard would seem to lead to the opposite conclusion.[24]

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[18] *Cf.* Richardson *loc. cit.*, p. 429: "... it is generally in the public interest that civil servants should be dismissible at pleasure."

[19] *Ibid.*, p. 430.

[20] See, for example, 9 Halsbury's *Laws of England*, 3rd ed., Vol. 7, p. 392; Anson's *Law and Customs of the Constitution*, 4th ed., Vol. 2, Part 2, pp. 335–336; Stephen's *Commentaries*, 18th ed., Vol. 3, p. 250.

[21] 1926, S.C. 842 at 859.

[22] [1943] P. 68 at 78.

In view of the exhaustive discussion of the question of the civil servant's right to salary which has taken place elsewhere [25] it is not proposed to consider further the strictly legal aspects of the right to civil service pay. But, in any case, this is unnecessary since the practice of the service leaves in no doubt the strength of the civil servant's claim for remuneration for work performed. Moreover, this practice is backed by a political "convention" which assures the civil servant's salary in a way that makes legal guarantees unnecessary.

In 1936 the Civil Service Arbitration Court was replaced by the Civil Service Arbitration Tribunal. This was done by means of amendments to the 1925 National Whitley Council Arbitration Agreement [26] under which the arbitration court had been established. Formally, Treasury authority is required for giving effect to an arbitration award which involves additional expenditure by any department; but, in announcing the establishment of the court in 1925, the Treasury pledged that, "subject to the overriding authority of Parliament the Government will give effect to the awards of the court." [27] This guarantee continues in respect of the awards of the Civil Service Arbitration Tribunal.[28]

And even in a clear case of dismissal on account of misconduct, the civil servant seems assured that the salary due will not be withheld [29]; it appears, therefore, that in practice the civil servant has little need to fear that the decisions in *Mulvenna* and *Lucas* will endanger in any way his claim for arrears of salary.

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[23] See Logan, "A Civil Servant and his Pay" (1945) 61 L.Q.R. 240 *et seq.* Dr. Logan at p. 265 says, ". . . the case for holding that a civil servant can sue the Crown for arrears of salary was never adequately presented to the court and this fact must cast doubt on the *ratio decidendi* selected by the court in *Lucas* v. *Lucas.*" And see p. 260, n. 24.

[24] See *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482 at 499, and *Commissioner of Inland Revenue* v. *Hambrook* [1956] 2 W.L.R. 919 at 825; and see also *Sutton* v. *Att.-Gen.* (1923) T.L.R. discussed *infra.*

[25] Logan, *loc. cit.*, and Richardson, loc. cit., pp. 445–454.

[26] On the Arbitration Agreement see L. D. White, *Whitley Councils in the British Civil Service* (1932); E. N. Gladden, *Civil Service Staff Relationships* (1943); H.M. Treasury: *Staff Relations in the Civil Service* (1955).

[27] *Treasury Circular*, March 14, 1925. The qualification was stated to have been inserted "to preserve the constitutional supremacy of Parliament and the possibility of a Government defeat there" and the pledge was said to mean "that the Government will not itself *propose* to Parliament the rejection of an award once made."

[28] It may be objected that this is scarcely adequate legal protection since the Government or Parliament could break this agreement with impunity. But this is surely the situation with regard to even our most fundamental legal rights and is certainly true of all constitutional conventions; in the last resort the political power of the State can assert itself. *Cf.* Jennings, *Law and the Constitution*, 3rd ed., pp. 136 *et seq.*

[29] *Treasury Circular*, June 6, 1954: "*Salary due at the date of dismissal*—On dismissal for any offence involving loss of public funds, any sums due but unpaid in respect of salary or wages up to the date of dismissal . . . may, and normally should, be withheld as set-off against the loss."

As in the case of tenure of office, this may appear to be merely stating the obvious; the civil servant has a doubtful right to sue for his salary in the courts of law, but is normally paid that salary as a matter of right. Yet, excessive attention to the legal rule may lead to the drawing of comparisons which are difficult to sustain when regard is had to reality.[30]

It has elsewhere been suggested that public interest is implicit in the judicial reasoning which has taken place on the subject of "dismissal at pleasure."[31] And it has been suggested above that basically this public interest lay in the administrative efficiency of government. In the early decisions dealing with the salary of the civil servant, this notion of administrative efficiency is if anything more clearly enunciated.[32] This emphasis on the need for efficient government may well be attributable to the new ideas of public office which were gaining currency from about 1780 onwards[33]; official positions were henceforth viewed as carrying stringent obligations to serve the State efficiently and with regard to the public interest.[34]

SUPERANNUATION

As with tenure of office and remuneration, so the civil servant enjoys no legal right to superannuation. In numerous decisions[35] this has been held to be the correct interpretation of section 30 of the

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[30] Thus, discussing the position of the public official in the United States, Professor Mitchell says (*Contracts of Public Authorities* (1954), p. 163): ". . . American officials are somewhat better off than their English counterparts in that they at least enjoy a right to accrued pay." But it is submitted that this can only be true, in any important sense, in so far as the protection of the law courts is of real importance in the employment relationship of the British civil servant; legal protection would appear to be more important in the United States than in Britain (because of the less well developed system of staff association and collective agreements of the former). It may, therefore, be misleading to draw comparisons on the basis of the legal rule alone.

[31] See Mitchell, *Contracts of Public Authorities* (1954), pp. 48–49.

[32] See *Flarty* v. *Odlum* (1790) 8 Term R. 681 at 682; *Wells* v. *Foster* (1841) 8 M. & W. 149 at 151 and 153; *Apthorpe* v. *Apthorpe* (1887) L.R. 12 P.D. 192 at 193; *Grenfell* v. *Dean and Canons of Windsor* (1840) 2 Beav. 544.

[33] Logan, *loc. cit.*, p. 245.

[34] This view is reinforced by the statement of Lord Langdale M.R. in *Grenfell* v. *Dean and Canons of Windsor* at 549 that had the office concerned not been a sinecure one but had involved performance of a public duty the decision might have been different: "because the public is interested . . . in the fit state of preparation of the party having to perform them [public duties]."

[35] *e.g., Edmunds* v. *Att.-Gen.* (1878) 47 L.J.Ch.; *Cooper* v. *R.* (1880) 14 Ch.D. 311; *Yorke* v. *R.* [1915] 1 K.B. 852; *Re Transferred Civil Servants (Ireland) Compensation* [1929] A.C. 242; *Nixon* v. *Att.-Gen.* [1931] A.C. 184.

Superannuation Act of 1834[36] taken together with section 2 of the Superannuation Act of 1859.[37]

In fact, of course, the civil servant need have no doubts about receiving his superannuation allowance if he satisfies the regulations.[38]

Clearly the language of section 30 of the Superannuation Act of 1934 leaves no room for the judicial consideration of doctrines of public policy and the like which is so evident in the cases concerning dismissal and salary. Nevertheless it is possible to detect some fairly strong indications that administrative efficiency has been the underlying consideration in a number of important aspects of the Civil Service Superannuation Scheme.

Giving evidence before the Royal Commission on Civil Service Superannuation[39] in 1903, the Permanent Secretary to the Treasury on being asked to give the motives behind the Civil Service pension scheme replied:

> "Firstly, no doubt, the pension is a direct addition to the salary; secondly, the pension is paid by the State for the purpose of having a more free control over the officer in removing him from his Department—when he becomes less efficient."[40]

This "control of the officer" in the interests of efficiency is evident in cases of transfer from the civil service to other employment.

Under section 4 of the Superannuation Act of 1914, for example, in cases where such a transfer is approved by the Treasury as being "in the widest sense in the public interest"[41] a contingent right to a civil service pension (based on length of service at the date of transfer) is granted to the transferred civil servant. If, however, a civil servant proposes to transfer to private or commercial employment the "discretionary" nature of the pension scheme becomes an important weapon in the hands of the Crown.

> ". . . a great many civil servants do acquire various skills of various kinds at the expense of their employer. Some of those skills are not particularly valuable except in the service of the

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[36] ". . . nothing in this Act shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury, and the heads or principal officers of the respective departments, of their power to dismiss any person from the public service without compensation."

[37] "The decision of the Treasury on any question which arises as to the application of any section of this Act . . . shall be final." See also the Superannuation Act, 1887, s. 9, and the Superannuation Act, 1909, s. 4.

[38] *Considine* v. *McInerney* [1916] 2 A.C. 162, especially Lord Buckmaster L.C. at 170; *Cf.* also Malins V.-C. in *Cooper* v. *The Queen* (1880) 14 Ch.D. 311, at 314.

[39] Cd. 1744, p. xxxiii.

[40] *Ibid.*, Q. 4061.

[41] Royal Commission on Civil Service, 1953–1955, Minutes of Evidence, 17th day, p. 794, para. 8. The wide range of employment which has been approved includes: Universities in the United Kingdom and the Commonwealth; N.A.T.O.; U.N. Agencies; Singapore City Council; Royal Canadian Navy. See Superannuation (Approved Employment) Rules, 1949 (S.I. 1949, No. 1327).

> State, but others are. It does not seem to us to be wrong that the Superannuation Scheme should be so designed that the possessors of those skills, when they have acquired them, cannot withdraw them except at a loss to themselves; and if . . . pension rights were to be regarded as . . . something to which they had a right in all circumstances—that would not in fact be the position.[42]

This control over experienced officials who propose to leave the civil service might be rendered nugatory if the legal right to pension were conceded. To some extent the easier transfer between public and private employment might have advantages for both employer and employee, but the dangers inherent in frequent transfers of such a nature should not be underestimated.[43]

Another aspect of the superannuation provisions in the civil service, which has given rise to considerations of administrative efficiency, concerns section 20 of the Act of 1834. This provides for the remuneration of civil service pensioners who continue in the service after retirement. Broadly, this section provides that:

(i) a re-employed pensioner always receives a full pay which is appropriate from time to time in his new post.

(ii) so long as that pay is as large as, or more than, his pay on retirement he draws no pension.

(iii) so long as his pay for the new job is less than his pay on retirement he draws only so much of his pension as will, when added to his pay, bring his total remuneration up to the amount of his pay at retirement.

Implicit in this is the principle that the superannuation allowance is not an indefeasible right; it is variable at the discretion of the Treasury, within certain well-defined statutory limits, according to the exigencies of the service. To proposals from the staff associations that the pension should remain unabated irrespective of the salary the Treasury have replied:

> " We are in fact being asked to give the pensioner re-employed . . . a sort of 'right' to his pension . . . How could such a situation . . . be regarded as consistent with the principles behind section 20? "[44]

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[42] *Ibid.*, p. 811, Q. 2574. *Cf.*: " C'est qu'en effet, il n'appartient pas à l'organisation d'un système équitable de retraite de stimuler le recrutement des fonctionnaires. Son rôle, très different, n'en est pas moins indispensable à une saine organisation administrative: il doit être la garantie la plus valable de la stabilité des personnels." *Guide pour l'établissement d'un statut du personnel des administrations civiles de l'Etat.* (1951); compiled under the direction of M. Roger Gregoire for the International Institute of Administrative Sciences.

[43] See, for example, C. W. McCardle: " The Public Service as a Springboard for Private Profit," 280 *Annals of the American Academy of Political and Social Science* (March, 1952), pp. 79 *et seq.*

[44] Priestley Commission, Minutes of Evidence, 17th day, p. 806.

The Treasury go on to say that to concede the request of the staff associations would require legislation; but stress even more strongly " the practical effects of the proposal." One of these is that in many cases retired civil servants who were re-employed would be in receipt of larger remuneration than more senior employees in receipt of salary only. The Treasury considers that this would lead to grievances in the service.[45]

It is not proposed here to examine the merits or otherwise of the proposals of the staff associations or the Treasury's rejection; the point is mentioned to illustrate how the topic of superannuation cannot be approached from the standpoint of legal rights alone. And, as has already been suggested, the strictly legal aspect matters little in the face of the well-established practice of the service.

RULES AND REGULATIONS

But probably the most important instance of conflict between strict law and the reality of the service concerns neither tenure, salary nor superannuation but the rules and regulations made by the Treasury for the administration of the civil service.[46]

The civil servant is hedged around by regulations which affect not only his official conduct but also his private life. Failure to obey these rules may result in severe disciplinary action varying from a reprimand to summary dismissal; on the other hand, as will be suggested later, they provide him with a readily ascertainable code of conduct which offers guarantees of just treatment. But it has been judicially decided in two cases [47] that civil service regulations confer no legally enforceable rights upon the civil servant.

It is interesting to compare these cases with the House of Lords decision in *Sutton* v. *Att.-Gen.*[48] The appellant was a telegraphist in the service of the Postmaster-General; on the outbreak of war in 1914, a Post Office circular was issued with the intention of encouraging the enlistment of Post Office employees in military units in which their civil service experience would be of use. The relevant part of that circular (dated September 27, 1914) was in these words:

> " Post Office servants enlisting as office telegraphists in the Royal Engineers Special Reserve Signal Section are allowed

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[45] *Ibid.*, pp. 806–807.

[46] Order in Council of August 3, 1956, art. 6, gives the Treasury power " to make regulations, or give instructions, for controlling the conduct of Her Majesty's Home Civil Service, and providing for the classification, remuneration and other conditions of service of all persons employed therein, whether permanent or temporary."

[47] *Shenton* v. *Smith* [1895] A.C. 229; *Rodwell* v. *Thomas* [1944] 1 K.B. 596.

[48] (1923) 39 T.L.R. 294. This case has been sadly neglected because of the absence of a full report; the writer is indebted to Messrs. W. B. Gurney and Sons, Shorthand Writers, for the full transcript of the judgments on which the above discussion is based.

> full civil pay in addition to military pay when called up for service."

This circular was further supplemented by another dated October 27, 1914, which stated that:

> "Post Office servants serving as office telegraphists or as line telegraphists in R.E. Signal Units of the Territorial Force receive, while serving abroad, full civil pay in addition to military pay and allowances."

On the strength of these circulars, the appellant enlisted in the R.E. Special Reserve Signal Section on September 7, 1915, and served overseas from October 1916 to March 1919.

During the war various demands for increases of pay for Post Office servants were made on their behalf by the National Committee of Postal and Telegraph Associations. The appellant was a member of one of these associations and contended that the increases granted should apply to him in the same way as they did to those Post Office servants who remained in their civil employment. The Crown argued that the words "full civil pay" meant the pay at the date of enlistment and that no account could be taken of the subsequent increases. The House of Lords decided in favour of the appellant.[49]

The attitude of their Lordships to the Post Office circular is revealing. The Lord Chancellor said:

> "The matter must stand upon the meaning to be attached to the words 'full civil pay' in the Circular No. 2187. Although the Circular was general in its terms and addressed to Post Office officials of different grades and avocations, yet the Appellant, having enlisted under that Circular, must be taken to have accepted the offer of the Postmaster-General there set out, so far as it was applicable to him . . . the issue is narrowed down to the question whether the words 'full civil pay' mean such pay 'at the date of enlistment' . . . or such pay 'as he would have received during the period of his military service if he had not enlisted.' . . . It is in fact a contest as to which is the right implication . . . and obviously subsequent events cannot be allowed to influence *the construction of the contract*." [50]

And, in even more unequivocal terms, the learned Lord Chancellor said:

> "I reject the contention that this [the inclusion or otherwise of the increases] is concluded by the decision of the Treasury . . . the Treasury decision is either *in accordance with the*

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[49] The decision was a divided one: Lord Birkenhead L.C., Lord Finlay and Lord Atkinson in favour of the appellant; Lord Sumner and Lord Phillimore against. But all their Lordships accepted that the Post Office circular in question was part of the appellant's "contract of service" with the Crown.

[50] Italics supplied.

> *contract* or else *a breach of the contract*, but certainly no bar to this House or any Court having jurisdiction deciding what the Appellant . . . would have received as pay had he remained in his civilian employment. . . . He was *entitled* to be paid . . . for his services the total amount of permanent pay and war bonuses. The term ' bonus ' may, of course, be properly used to describe payments made of grace and not as of right. But . . . it may also include, as here, payments made because *legally due*, but which the parties contemplate will not continue indefinitely." [51]

Lord Finlay similarly thought that: " The question in the case is as to the true interpretation of the Circular . . . under which the Appellant enlisted and served." And his Lordship, discussing the Crown's contention that the Circular conferred a right to the pay as at the date of enlistment and did not confer a right to share in new grants of pay which in terms did not apply to the Appellant, said:

> " . . . it is clear that [the increases] were not granted by His Majesty's Government to the Petitioner and others in the same position; his rights in respect of these increases, if he has any, are *purely contractual* and his claim is based upon the failure of the Government to implement the agreement . . . shown by the Circular. His case is that by the terms of his engagement he became entitled to get these increases just as much as those to whom they were granted." [52]

His Lordship rejected the Crown's contention and asserted that " the Petitioner and his fellows had a *contractual right* to share " in the increases " within the meaning of the Circular."

Lord Atkinson concurring in his view said:

> " The war bonus was not, I think, something different altogether from pay in its nature or character. I think the evidence shows it is part of the pay for the time being, not a present or gratuity or something external to pay to which the person receiving civil pay has *no right under his contract of service*." [53]

The dissenting judgments are no less conclusive in their opinion that the Circular formed part of the contract with the Crown. Lord Sumner was clear and unambiguous that:

> " Circular No. 2187 is addressed to a great number of persons; being in the nature of an offer by advertisement, it could not be otherwise, but, *when it becomes a contract by the Suppliant's acceptance of it, there arises a strictly several contract* . . . when a contract eventually arises, it is *a contract*

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[51] Italics supplied.

[52] Italics supplied.

[53] Italics supplied

> *between the Postmaster-General and the individual* person who does the wholly individual act of volunteering and thereby *accepts the terms of the general offer,* and that contract must be interpreted according to the terms of the offer. . . ."[54]

It is clear, therefore, from the foregoing that there is every reason to believe that had the *Sutton* case been presented to Tucker J. in *Rodwell* v. *Thomas,* his Lordship would have been less willing to deny contractual consequences to the terms of the Treasury circular.[55]

In any case, in practice most conditions of service will be the subject of intensive discussions between the representatives of the "staff" and the "official" sides of the service. This may be either through the medium of the Whitley system (where the interests of more than one class or homogeneous group of classes of civil servants are involved) or between a particular department and an association recognised as representing a class of civil servants within that department.

The results of these negotiations are thereafter incorporated in Treasury Circulars, Establishment Circulars, Regulations and Minutes and, if they are likely to be of a fairly permanent nature, they are then included in a manual of regulations called, officially, Estacode.

These civil service collective agreements according to the case of *Rodwell* v. *Thomas*[56] do not confer any enforceable contractual rights on the civil servant. As mentioned above, there is strong authority for doubting the correctness of this decision,[57] but, in any case, this lack of contractual force does not really matter as there is another aspect of civil service rules and regulations which is of greater importance than their contractual aspect, although it appears to have been largely ignored.

Assuming that a civil service "collective agreement" has been made and is thereafter incorporated in Estacode, what are its effects? It creates certain obligations between the parties to it; but, further, it establishes a code of conduct for the civil service generally. In other words, there is a distinction to be drawn between the "contractual" effects of the agreement and the "normative" or "legislative" effects.[58]

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[54] Italics supplied.

[55] The import of the *Sutton* case on the question of the right to salary is unmistakable. Relying on the reported version, Dr. Logan (*loc. cit.,* p. 265) says "the Crown never questioned the right of the suppliant [to enforce his right to pay] . . . but the argument *ab silentio* cannot be ignored." Just how strong the argument is can be gauged by the remarks of Lord Sumner that: "In ordinary English, 'pay' means something narrower than something paid; it means something contractually payable. This is the essence. It may or may not be paid, though of course it ought to be paid. It is a word indicative of the performance of obligation on the one side and of right on the other, but it is not necessarily a word indicative of the performance of an obligation. Still less should it include any non-contractual payment like a Christmas box or other mere gratuity." It is difficult to see how in the face of this statement any case can be made out for an inherent inability to enforce a claim for civil service salary.

[56] [1944] K.B. 596.

[57] See, *supra,* pp. 19–22, and *Sutton* v. *Att.-Gen.* (1923) 39 T.L.R. 294 discussed there.

It is this latter, "legislative" aspect of the collective agreement which is of the greater practical importance. The rules and regulations formulated by Orders in Council, Treasury Minutes and the various other types of civil service enactments already mentioned together constitute a law of the civil service which is obeyed by both employer and employee. This code of norms governs the status of the civil servant and confers rights and obligations on both the servant and the employer.[59]

It is true that whether or not the civil service rules and regulations are regarded as contractual or legislative, they are "binding in honour" only. That is, the "rights" and "duties" which they are intended to yield are not rights and duties in the strictly legal sense of being enforceable in the ordinary courts of law. Any sanction which attaches to a breach of the regulations will be an administrative one imposed within the framework of intra-service discipline.

But it is surely unrealistic to regard the rules of the civil service as other than a proper system of law, no less effective than that made by Parliament in statutes or the common law of the law courts.[60] Professor Robson has clearly stated the significance of the law of the civil service:

> "The fact that there is very little legislation or case law dealing with the civil service does not necessarily mean that there is no law and practice of the civil service. There is such a thing as customary administrative law; and I contend that there is a considerable body of customary administrative law and practice regulating the civil service. By this I mean a pattern of conduct regulating the relations between the Crown and its servants, involving obligations which are clearly formulated and regularly followed by all concerned. Such a pattern of conduct can give rise to rights and duties which are effectively recognised and

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[58] *Cf.* Kahn-Freund, *op. cit.*, pp. 55–61. As is pointed out by Professor Kahn-Freund, this distinction is well known to German and French legal literature, although its significance appears to have been underestimated here.

[59] *Cf.* Denning L.J. in *Bonsor* v. *Musicians' Union* [1954] Ch. 479, where at 485–486 he indicated that in respect of the rules of trade associations it is often unrealistic to talk of contract as the rules are "more in the nature of a legislative code."

[60] There is also the "negative" aspect of these rules to be considered. They are binding only on the civil servant and not directly on anyone outside the service. But "negatively" everyone is under a legal duty not to interfere with the rights and obligations they confer. *Cf.* Allen, *Law in the Making*, 5th ed., p. 519: "All valid autonomic legislation, however restricted its positive scope, may be said to have this negative and by no means unimportant meaning for the whole body of citizens; and it, therefore, cannot be regarded as something altogether distinct and apart from the general rule of law."

observed by the administrative authorities concerned even though they are not enforceable in the courts of law." [61]

The reluctance of lawyers generally to give adequate recognition to the real significance of the law of the civil service has confused the true legal position of the civil servant and has led to an undue emphasis on the urgent need to protect the civil servant against the Crown, and to the suggestion that the only way in which such protection can be given is either by incorporating the civil servant's conditions of service in a statute or in proper administrative contracts.

CONCLUSION

In view of the foregoing it is suggested that the need to "legalise" further the employment relationship of the civil servant can be greatly exaggerated. The absence of a statute or an individual contract does not leave the civil servant unprotected. He has the protection afforded by the influence and standing of the Staff Associations; by the well-entrenched and universally accepted system of collective negotiations and by the fact that those who staff Establishment Divisions are not unaware of the needs of the employee.

This may seem rather shifting sand on which to build a sound edifice of harmonious staff relations but the *ethos* of the civil service provides the civil servant with a protection which may well be stronger than that which the letter of the law could provide.[62]

An American administrator has remarked that the crux of employer-employee relations "is more than passing laws and writing regulations . . . these contribute little and often actually stand in the way." [63] This is well recognised in the British Civil Service but the public lawyer has been slow to appreciate it.

Legal rights, either statutory or contractual, can mean little in reality; the spirit of the law is of greater practical importance than the letter.[64] The few cases involving civil servants which come before the courts may perhaps be due to the employee's knowledge that he has little chance of success against the Crown.[65] But surely this dearth of civil service lawsuits is likely to be evidence of a healthy state of employer-employee relations.[66]

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[61] *British Government since 1918*, Lord Campion (ed.), p. 97. Professor Robson also quotes, at p. 98, Ernst Freund's statement that "voluntary and long continued administrative practice has many of the characteristics of law and, under favourable conditions, inherent guarantees of fairness may approach those which are generally associated with the courts of justice." *Cf.* E. C. S. Wade's Appendix to Dicey's *Law of the Constitution*, p. 530: ". . . there are rules contained in Orders in Council and Treasury warrants and minutes which provide the effective law of the Civil Service." And see also Jennings, *Law and the Constitution*, 3rd ed., at p. 179: ". . . there is a 'law and practice of the civil service' as there is a law and practice of Parliament."

[62] *Cf.* Borchard: "The protection of the individual against the Administration depends less upon the tribunal than on the *mores* of a particular community as reflected in the political instrument it creates." Quoted by Dicey, *Law of the Constitution*, 9th ed., App. p. 477.

[63] H. L. Case, Director of Personnel, Tennessee Valley Authority, in *Public Administration Review*, Vol. XV, No. 2, 1955, p. 101.

[64] Discussing the right of the American employee to organise, Professor A. Dotson says: "In private enterprise this right is now generally conceded to be

The British Constitution relies very little on *lex scripta*; but it has stood the tests of political strife rather better than most European constitutions. The British Civil Service has been called "the most peculiar of our political institutions"[67] and we should not be surprised, therefore, if it pays little heed to "lawyers' law." The price we have to pay for a comparatively harmonious system of employment relations in the civil service is a theoretical lack of legal safeguards; can it be said that the price is too high?

'fundamental.' It is only protected, not given, by legislation. But the public employee's right, when it exists at all, is given by statute and is subject to peremptory restriction." *Public Administration Review*, Vol. XV, No. 2, 1955, p. 84. This suggests that the reality of practice is often more reliable than the legal "right."

[65] See Street, *op. cit.*, pp. 115–116.

[66] *Cf.* Kahn-Freund, *op. cit.*, p. 44: "Reliance on legislation and on legal sanctions for the enforcement of rights and duties between employers and employees may be a symptom of an actual or impending breakdown and, especially on the side of the unions, frequently a sign of weakness, certainly not a sign of strength."

[67] Jennings, *op. cit.*, p. 177.

PUBLICITY OF OFFICIAL DOCUMENTS IN SWEDEN

NILS HERLITZ

INTRODUCTION

WHEN a Swede has to give an account of the public law and the political life of his country, there is often one point where his audience will be impressed—and confused. It is when he mentions that, in principle, the records of public authorities are open to anybody who wants to see a document. Many times, speaking on this topic, it has afforded me a great deal of amusement to study the countenance of a hearer. Whilst he shows the courtesy not to make any observations, it is obvious that he ponders a question. Is this man unable to express himself intelligibly in my language, so that I have misunderstood him? Or is he mad?

The editor of Public Law has realised that another explanation may be given and has asked me to give it. I have accepted the invitation with great pleasure. Never before, I suppose, has an explicit statement on the subject been given in a non-Scandinavian language; nobody has come further than mentioning the publicity of documents in a few words. It may be of some interest to throw a little more light upon the question since Swedish law is, undoubtedly, rather peculiar in this respect and has attracted a great deal of attention and curiosity in other countries.[1]

The publicity of official documents is guaranteed in one of the four Acts which compose the Swedish Constitution: the Freedom of

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[*] The author is professor emeritus of constitutional and administrative law in the University of Stockholm.

[1] In the United States there is an interesting counterpart to the Swedish system. See H. L. Cross, *The People's Right to Know*, Columbia University Press, 1953. By a great number of State statutes, far-going legal access to public records has been established (pp. 49 *et seq.*, 69 *et seq.*, 337 *et seq.*). And even in the absence of such statutes a right to inspect public records has been upheld by the courts, as based on "common law" (pp. 26 *et seq.*, 55 *et seq.*; on the background in English law *cf.* p. 25). As to federal government, however, there is no general right to inspect records, and the statutes granting such a right are not numerous (pp. 197 *et seq.*). A certain amount of publicity is also secured in Swiss cantonal government, but it applies mainly to the administration of public finances. *Cf.* G. Schmied, "Das Recht des Privaten zur Einsichtnahme in Verwaltungsakten" (*Zentralblatt für Staats- und Gemeindever-waltung*, 1952 pp. 57 *et seq.*), E. Kalt, *Das Prinzip der Oeffentlichkeit staatlichen Handelns als Voraussetzung der demokratischen Willensbildung, diss.* Zürich 1953). In Finland a statute of 1951 proclaims, following the traditions from the time when Finland was a part of the Swedish realm, the publicity of official documents, but only with very extensive exceptions. In Denmark and Norway proposals to follow the same line are being seriously discussed.

the Press Act (FPA), April 5, 1949.[2] Its second chapter deals with "the publicity of official documents." It is remarkable that, whilst the Constitution does not contain any catalogue of civic rights, this right has—together with the freedom of the press—been regarded as so important that the Constitution should not only proclaim it in principle but regulate it in detail.

"To further free interchange of opinion and general enlightenment every Swedish citizen shall have free access to official documents in the manner specified below. This right shall be subject only to such restrictions as are required out of consideration for the security of the realm and its relations with foreign powers, or in connection with official activities for inspection, control or other supervision, or for the prevention and prosecution of crime, or to protect the legitimate economic interests of the State, communities and individuals, or out of consideration for the maintenance of privacy, security of the person, decency and morality.

"The specific cases in which official documents are to be kept secret, according to the aforementioned principles, shall be closely defined in a special statute, enacted jointly by the King and the Parliament" (FPA II: 1).

"Public documents are all documents kept by a State or communal authority, whether received or prepared by such authority" (FPA II: 2).

In their present formulation, these prescriptions are not more than eight years old. But they do not express the caprice of a modern legislator. They are deeply rooted in Swedish constitutional history. The beginning was made in 1766, in the last decade of the so-called Era of Liberty (1719–1772),[3] when the four "estates of the realm" had built up a government on the basis of their supremacy. One party had in this year taken power from another. One of its watchwords was a fight against the secrecy in public affairs which had been maintained before. Its most notable achievement was our first statute on the freedom of the press in 1766. Publicity of official documents, not so far-going, though, as today, was established in the same statute as a sort of appendix to this freedom. The citizens were allowed to publish, by printing, several sorts of documents, and for this purpose they were entitled to demand such documents from the authorities. This combination has remained in men's minds; the publicity of documents is still regarded as an ingredient in the freedom of the press. As a matter of fact this view is quite misleading. The right to publish documents does not in any way logically imply a right to demand documents which you have not in your hands. We know very well the background to the freedom of the press in the provisions of 1766. But, curiously enough, parliamentary documents and other sources, as far as they have been disclosed, give no explanation why the very remarkable second step was taken, why access was given to official records. But the general background may help to explain it. It was at that time very characteristic of Swedish government—as it is, in a way, still—that Parliament should exercise a very substantial control over courts and administrative authorities, which had to deliver minutes and other documents to parliamentary commissions. It was certainly a great step to give such rights to all citizens. But this step may have been facilitated not only by political ideas identifying Parliament and people, but also by the general spirit prevailing in Swedish political life. Less than in other countries public affairs were *arcana* to the citizens; in many ways they took part in them, especially in local affairs. The publicity of documents implied that this connection was carried into effect on a higher level and strengthened.[4]

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[2] See *The Constitution of Sweden* translated by Sarah V. Thorelli, with an introduction by E. Håstad (Stockholm, 1954), pp. 82 *et seq.* I follow the translation given here, with some modifications.

[3] Herlitz, *Sweden, A Modern Democracy on Ancient Foundations* (Minneapolis, Minnesota University Press, 1939), pp. 25 *et seq.*

When Gustavus III broke parliamentary omnipotence in 1772 the publicity of documents, as well as the freedom of the press, was certainly not abolished, but highly endangered. But after the political revolution of 1809, which established the division of powers still in force,[5] both were not only restored in 1810 but realised in a more systematic and comprehensive form than in 1766. Since that time the publicity of documents has remained beyond dispute. It is difficult to estimate its practical importance in earlier days. We know of many cases where its purport has been judged by courts. But no historical investigations have been made in order to study systematically how the legislation was applied and the role it played in political life.

In the last fifty years, however, the publicity of documents has become a more and more momentous issue, owing to the steadily growing comprehensiveness and importance of public activity, which has intensified the tension between public and private interests. On the one side it has proved necessary to make a great number of exceptions to the publicity provisions (see p. 58). In 1937 it was made possible to make such exceptions by ordinary legislation (earlier exceptions had to be made by amendments to the Freedom of the Press Act, in accordance with the special procedure for constitutional legislation) and, consequently, the Secrecy Act[6] was enacted. That the catalogue of exceptions has been enlarged is due not only to the development of State activity which has raised new problems. Partly the reason has been that, in fields where publicity had not, in fact, been taken seriously (owing to manifest inconveniences), a legal basis for secrecy was thought to be necessary.

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[4] *Ibid.*, pp. 88 *et seq.*, 118–119.

[5] *Ibid.*, pp. 30 *et seq.*

[6] SA = Secrecy Act, May 28, 1937.

On the other side much has been done by legislation to make publicity more effective and to widen its scope. The detailed catalogue of the Secrecy Act has also a considerable effect *e contrario*. Since we have modern legislation providing for secrecy when it is necessary (legislation which can easily be extended when new needs arise) it follows that where publicity is required, it must be properly and conscientiously adhered to. And publicity has nowadays a very strong support in public opinion, as a keystone of our constitutional system. It is a considerable and effective force felt in every section of social life.

PURPORT OF PUBLICITY

Publicity means access to official documents kept by the authorities. First, State authorities. FPA II: 3 makes it clear that no limitation is aimed at by the word " authority." Public documents are those kept by all sorts of administrative agencies, from the government departments [7] to, for instance, police officers, rectors, land-surveyors, and station-masters. There are Swedish counterparts to British administrative tribunals; their documents are also included. And so are the documents of the courts.[8] Even Parliament is under the rule; you are for instance entitled to see the minutes of its committees. For a long time it was controversial whether the rules on publicity should be understood as valid also for the municipalities and their organs. A revision of the text in 1937 removed every doubt; " communal authorities " as well as State authorities must produce their documents. This applies not only to officers and officials, but also for instance to a board consisting merely of elected laymen. As in most countries, public tasks are often fulfilled by separate bodies, for instance joint-stock companies. To them the prescriptions are not applicable. When such forms are used it is, usually, in order to make their work independent of rules which hamper State activity. As a matter of fact one important aim is often precisely to avoid publicity.[9] It should be observed, however, that separate bodies are far from playing the role of " public corporations " in

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[7] Otherwise in the United States. Cross, *op. cit.*, p. 80.

[8] In order to make my account less complicated, I will, in the following, disregard court documents and only consider the documents of administrative authorities.

[9] Sometimes, however, separate institutions, which receive aids from the government, are in return ordered to apply more or less of the FPA ch. II.

Great Britain. It is mainly for economic enterprises that such bodies are constituted.

Everybody[10] is entitled to access to documents. A citizen who wants to see a document is not obliged to give any reasons or to say for what purpose he wants it.[11] Nor has he to show that he has a legal interest in seeing a document. His right should not be confounded with the right of "parties" to be heard in affairs concerning them and to be, in that connection, informed of relevant matters. This right is in some important respects more extensive. Not only in so far as it implies a duty of the authorities to be active *ex officio* in the interests of the party, whilst, according to FPA, they only have to act when somebody asks for it. But also in that the right of parties is not, in principle, restricted by the exceptions made in the SA; the production of decisions can never be refused to them, and other documents may be kept secret from them, according to the prescriptions of the SA, only when, "with regard to public or private interest," it is "particularly important" (SA 39). Nevertheless the publicity afforded by the FPA is not without importance for parties. As everywhere, it will very often be doubtful how far the principle *audi alteram partem* goes in a special case; in such cases it is important that he who holds that he has a legal interest in an affair but is neglected by the authority can always make use of the rights granted by the FPA.

But this is not the gist of publicity. The gist is that the authorities welcome the "man in the street," *quivis ex populo*, who wishes to know what is going on. He has also the right to publish (in printing) public documents (FPA I: 1). He will appear now and then, here and there, when he wants to know something. Very often, most often, perhaps, he will appear in the shape of a newspaperman. When a newspaper takes interest in an "affair," it will not omit to be very active in this way and to gather all information available in public documents. The information of the newspapers has also been organised as a routine service. Every day, in the great offices in Stockholm, for instance, documents which have been received will be brought to a room where representatives of the newspapers are welcome to see them. A representative of the leading news bureau will never fail to appear, and through him a flood of news will go to the newspapers and to the general public.

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[10] FPA mentions only "Swedish citizens" in II:1. But, according to FPA XIV:5 "foreign nationals shall be treated on a basis of equality with Swedish citizens . . . except as otherwise provided in this Act or in other statutes or statutory instruments." In cases brought before the courts there are many examples of foreigners having had access to documents in immigration offices.

[11] Otherwise in the United States. Cross, *op. cit.*, pp. 35 *et seq.*

The purpose is this. Just as publicity in the courts all over the world makes it possible for everybody to know how justice is administered, the publicity of documents has the same effect in so far as documents reflect the activity of the authorities; the publicity shall provide " general enlightenment " (FPA II: 1). Publicity, if it is made use of, provides, first, knowledge of what steps have been taken—and not taken—by the authorities. Every decision is accessible. But in addition we are, in so far as public documents give information, acquainted with the background of decisions: the complex of facts, interests, arguments, motives, on the basis of which an authority has decided or is going to decide. I underline the words " is going to "; the authorities are under observation not only after a decision is taken but also at the preparatory stage.

The rules apply to different sorts of documents belonging to the preparatory stages. Applications of private persons and all materials they may have brought in are public. If conflicting interests are brought before an authority, we are acquainted with the facts they have adduced and their argumentation. The access to materials prepared within the authority that has to decide is somewhat problematic (see p. 65). But if two or more authorities co-operate, publicity comes into full effect.[12] If the authority which has to decide has received reports or information from other authorities these documents are public. In this way we are made familiar with the divergent opinions of different authorities. Civil servants appear before us with their own visages, with their specific ways of thinking and judging public affairs. In this connection the structure of Swedish administration is very important. The central administration is not organised as a group of services, each fully integrated under the immediate control of a Minister, but consists of two distinct elements: the King and his Counsellors (Ministers) with their " departments of State," and a number of separate " central offices," most of them with a director-general as their head.[13] We are, in matters of major and minor importance, where the latter have to give advice to the Government, informed of their views.

In this way we are furnished with " food for thought." Our judgment on public affairs is facilitated; the public debate is given a firmer basis, whether we judge what the authorities think, or what they have done, or what they should do. The authorities are at any moment exposed to criticism based on divergent opinions and on knowledge about relevant facts. Publicity is a powerful instrument of control in the hands of anybody who wants to use it in this way.

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[12] Otherwise in the United States. Cross, *op. cit.*, p. 80.

[13] Herlitz, *op. cit.*, pp. 64 *et seq.*, *Revue Internationale des Sciences Administratives,* 1953, pp. 536 *et seq.*

It may be shown that an authority has neglected relevant facts, that the materials for a decision contain false assertions and arguments, that the authority was unduly influenced by some interests, has not given equal treatment to citizens, has abused its powers and so on. But it is not, I repeat, only after a decision that an authority is exposed to such reactions based on publicity. Public opinion or the opinion of interested persons and groups may be felt, with all the weight which good information renders, at the preparatory stage. And even if such an opinion is not actually expressed, the possibility of criticism *a posteriori* has a considerable preventive effect.

This is perhaps the most important consequence of publicity: in every step an authority takes, it feels that it is under public control, under the imminent danger of having its steps discussed and criticised. The publicity is always in the minds of the officials and makes them anxious to act in such a way that they will not be exposed to criticism. This situation will, in a way, make them cautious, perhaps sometimes over-scrupulous. But on the other hand they will feel a certain amount of confidence. They need not be exposed to vague suspicions, since there is always an opportunity to control their work. And, after all, the wind which sweeps from without over the work of the authorities is not always harsh and unfriendly. If publicity is a plague to authorities which are inclined to take wrong steps, it may also give considerable support to other authorities, provide them with good information and prevent their being deceived by false information and unfounded pretensions. In a word, publicity creates, when it is effective, quite a peculiar atmosphere of openness and confidence in which administration has to work.

Certainly, this situation is in a way problematical. It depends on the sort of reactions publicity will bring about. One can never be sure that it will support honesty, impartiality, right thinking, and effectiveness. To make public opinion a power in political and social life always involves some risks. The publicity of documents is, however, supposed to favour good administration. And on the whole these expectations have not been frustrated.

Publicity has remarkable consequences on the position of the Government—to which it applies as well as to other authorities. It is not unusual for the opinions of central offices (see p. 55) or of province-governors to become powerful elements in public opinion. The Government will experience that very often. It will be said in the newspapers that it seems impossible to act against the opinion which represents expert knowledge. Bringing bills before Parliament the Government, considering that anybody may make the materials public, will never neglect to give part of the reports which have been gathered, often very abundantly, from different authorities. And it is usual for their views to become good weapons in the hand of the Opposition. It is an old saying that the Opposition has its best arsenal in the records of the Government.

The publicity of documents has, however, other effects than those principally aimed at. I have already mentioned that it serves the interests of parties (see p. 54). I have also mentioned the possibility that public opinion may react in such a way that good administration is not furthered. It should in addition be observed that publicity provides information in many cases where the activity of the administration is beyond discussion, or nearly so, cases where, therefore, publicity scarcely can be regarded as an instrument of control.

When the newspapers take interest in publicity, it is not only in order to get a basis for discussion and criticism. It is also because it affords excellent sources of news, about what is going on in administration, and also about private persons, their personal and economic affairs and so on.

Private persons, too, may for one reason or another have an interest in seeing documents, though they do not care for what the authorities have done or are going to do. An authority may have procured scientific or similar investigations which are valuable also for a private person. Or he may like to know something about his fellow-creatures; he is perhaps curious about their personal and economic affairs, or has some real interest in getting information about them. Now the records are full of such material. And they must be disclosed,[14] even if it is apparent that the motives are far from being those of interest in official affairs.

That the archives are open to historical research is also a consequence of publicity which does not fall within the scope of its proper purposes.

Documents must be disclosed. But FPA has not put the officials under any obligation to give information in other forms, neither *ex officio* nor at request. In fact, however, the publicity of documents has important consequences on such information.

It is in Sweden, irrespective of FPA, regarded as important that the authorities should render good " service " to private persons. They should help them as much as possible by giving them information.[15] How far this duty goes will always be controversial; in many cases information is prohibited by a duty to keep things secret. But as a rule such a duty can scarcely be invoked as to the content of documents which are public according to FPA.

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[14] In one case a vicar was unwilling to tell a business-man, from the parish register, whither a debtor had moved; but he was obliged to disclose it.

[15] It is a duty for every State authority to " supply the general public with information on questions concerning the sphere of activity of the authority, if not rendering such assistance is, for special reasons, found to be inconvenient " (Order 18/10/1946). And the heads of most authorities are under the obligation to " make special arrangements in order to facilitate, for parties, for the Press

I cannot compare the relations between the administration and the citizens in Sweden and in other countries. But I suppose that it may be stated that the publicity of documents has created a peculiar spirit of openness. It is natural for the authorities to answer without severe restrictions when they are asked. And also spontaneously they will be rather generous in giving information on public affairs, particularly to newspapers—so that it is unnecessary to ask for documents.

PROBLEMS OF PUBLICITY—EXCEPTIONS

It would be an understatement to say that in Sweden publicity is generally and highly estimated. It would be more exact to say that it is regarded as indispensable. Whilst, in the eyes of other nations, publicity may look impossible and incredible, most Swedes, including many high lawyers, regard the access to official documents as something like a natural right and believe that it has a counterpart in all civilised countries. When, in a controversial case, publicity has been refused, very often an exclamation like this may be heard: "This is incompatible with the rule of law."

Though publicity is, in fact, a peculiar Swedish institution, I agree with those who regard it as indispensable: *we* could not do without it. That it has grown up in Sweden may be due to special circumstances; we may almost say it has arisen by accident. But it has become a fundamental part of our political system. We could not abandon it without injuring the very spirit of administration and citizenship.

But it is self-evident that publicity has its problems. It cannot but conflict with important interests. First private interests. It is in many situations a very great inconvenience that information about a private person and his affairs may be delivered to anybody and published in the newspapers. Sometimes very serious damage may be inflicted on him. His private life may be laid open. His relations with other persons may be exposed. Anybody, for instance a competitor, may be informed about his economic situation: his fortune, his income, the structure of his business and so on. A private person may also suffer in another way. If, when writing to an authority, he communicates facts or expresses opinions concerning another person or a group, he may expose himself to attacks from

and for other persons interested, the obtaining of information about cases and matters in the authority" (Regulation 7/1/1955).

this side, if it becomes known that he has made a communication and what he has written.[16]

It is a consequence of the development of State intervention and welfare policy that the citizens feel more and more the inconveniences of publicity and may be inclined to disregard its value.

Evidently also public interests may be damaged. It is superfluous to give a long list of examples; it may be enough to mention foreign policy, defence and police. And of course the State and the municipalities have economic interests which may as well be injured as those of private persons. There is one more essential inconvenience. Everybody who writes to an authority, whether it be another authority or a private person, has to remember that he does not direct himself to that authority only. He must also contemplate that his utterances may be known to anybody. Certainly in a way this is, as I have already said, a very good thing. When anybody can make sure whether you tell the truth or not, you will be more careful, and the information the authorities get will be more reliable. But of course there are many things you hesitate (for different reasons, one already mentioned) to put on paper, when you know that it will become public—though the facts and views you have to present are of great importance in questions to be decided by the authority to which you have to address yourself. The reasons for avoiding publicity may be small and personal, but sometimes they are very understandable and worthy of respect. However that may be, it may happen that the authority, which should be informed in writing, gets the information informally, by telephone, personal visits, etc., or that, to the detriment of the public interest, the information, which is regarded as delicate, is not given at all. In this way the authorities may fail to get the information they need, because they have to share it with anybody.

We see all these difficulties and inconveniences. That, in spite of them, we maintain publicity shows how highly we value it: the advantages are regarded as counterpoising very considerable disadvantages.

That is to say: we maintain it as a principle. But we have had to make compromises. Compromise might have been made by giving to the authorities general powers to refuse access to documents in cases where producing them would be detrimental to public or private interests.[17] But this method has been regarded as dangerous: the exceptions from publicity should be defined. Therefore, the Secrecy Act contains, as mentioned above, a long catalogue of such exceptions.

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[16] *Cf.* Cross, *op. cit.*, pp. 78 *et seq.*

[17] This is, to a great extent, the standpoint of American and Swiss law. As to statutory exceptions in the United States, *cf.* Cross, *op. cit.*, pp. 84 *et seq.*

It has been a difficult task to shape them: to consider, in all fields of public administration, the divergent interests, which come into conflict with each other, often in a very complicated way, and to weigh them. As a result of balancing the opposite interests the content of SA is always controversial. It has often been claimed that it has gone too far in considering too scrupulously the possibility that an interest may be damaged; on the other side, publicity has been regarded as inconvenient in some fields where it is now upheld. According to FPA II: 1 the exceptions are, as a rule, prohibitive. Not only is the right of the citizens overruled; the authorities are forbidden to deliver certain documents. In this way SA protects effectively such interests as are mentioned in FPA II: 1 (see p. 51). The exceptions should always be made by SA, not—without being duly observed by Parliament—in other statutes. And the exceptions should be "closely defined."

These are the principles. They are, however, modified in so far as in many situations publicity and secrecy depend, more or less, on the judgment of the authorities. Very often SA uses, and must use, rather vague and undetermined descriptions which may be understood in different ways. In some situations an authority is entitled to deliver documents which are in principle secret. Sometimes it is then left to its discretion whether documents should be delivered; sometimes the circumstances under which publicity should be granted are more or less defined. Stipulations may be made to ensure that a document is not misused. The protection given by SA to private interests very often depends on the will of the persons concerned: documents may be produced with their consent. In some fields the power to stipulate restrictions is delegated to the Government. The restrictions on publicity are only valid for a certain space of time. Sometimes the documents must be made public after a number of years (2, 10, 20, 50). In other cases the critical date is defined in other ways. The restrictions are not valid for documents preserved in the courts (SA 36: 5). Such documents are secret only if, in a case that has been for special reasons treated *in camera*, the court so decides.[18]

Secrecy of documents has of course important consequences for the question, how far authorities and officers may, otherwise than by producing documents, disclose what they know. As a general rule their duty to keep things secret must be somewhat the same in both cases. But the question is in many situations complicated. A particularly difficult point is that FPA I: 1 grants a general, very far-going right to give information to an author or an editor for the purpose of publication. This right is partly, but not wholly, restricted by the duties of civil servants to keep things secret (FPA VII: 3). These difficult questions cannot be discussed here.

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[18] Very often the question is raised whether one authority has to deliver documents to another authority. This may be a very delicate question. It is, however, solved neither by FPA nor by SA. The communications between authorities are not based on FPA—though, of course, an authority cannot reasonably be denied access to a document available to everybody. And SA is not concerned with these communications—though, certainly, in many cases a document, which is secret according to SA, should be used only for certain purposes and, accordingly, not be delivered to other authorities.

It is not possible to demonstrate the scope of publicity by an exhaustive discussion of SA. But the general character of the compromises which have been made may be elucidated, if some important exceptions are presented. In this connection a few controversial cases will be mentioned where no exception has been found applicable.[19] Occasionally I shall say something about situations where publicity reigns undisputably. But the reader is supposed to get an impression of its scope mainly by the exceptions and the controversial cases, drawing conclusions *a fortiori* from them.

Protected from publicity are documents concerning foreign powers and Sweden's relations with them and their authorities (SA 3). And so are, to some extent, documents concerning the defence of the realm (SA 4: 1). This is, however, far from implying that the activities of the Foreign Office or of the military administration are kept secret altogether. This is particularly true for military documents. SA enumerates carefully matters which should be secret. But in wide fields publicity prevails. In the reports of the Procurator of Military Affairs (see p. 68) one finds many cases where he has vindicated publicity when it was unduly set aside.

Concerning the documents of the police, divergent interests will often clash rather fiercely. The newspapers are anxious to have news and to discuss what is going on. Private persons may have a strong interest in publicity or in secrecy. State interests obviously demand that the information the police has at its disposal should not be disclosed recklessly. SA 10 protects documents concerning the activity " for the prevention and prosecution of crime " but only by a rather vague and elastic clause: they should be kept secret, if " it may reasonably be feared that their being delivered will impede the discovery of crimes or the investigation in a criminal case or activities to prevent crimes or will be injurious to the security of the realm or to private persons." Very often, of course, the applicability of the last-mentioned clause—which refers both to those who are suspected to have committed crimes and other persons—will be controversial.[20] At any rate, documents which are produced before a court will, in principle, be public (see p. 60). Functions of the police, other than those concerning prevention and prosecution of crimes, are, as a rule, subject to the general publicity.

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[19] I shall refer here to decisions made by the courts (see p. 68).

[20] The police office in Stockholm keeps a register of travellers; it may be useful for the control over criminal persons but it has been regarded as a public document.

There are several other situations—beside the activity against crimes—in which public activity may be thwarted, if informations and plans and investigations are disclosed in advance. There is no general protective clause for such situations, but a number of special rules, concerning, for instance, inspections and examinations (SA 7), town-planning (SA 8) and scientific investigations (SA 9).

FPA takes care of the sacredness of privacy (see p. 51). Now, modern public activities—above all social policy and health service—have resulted in the possession by authorities of an immense mass of information concerning personal conditions: family relations, health, manner of living, character, conduct, qualities, etc. SA has a number of rules (11–14, 26) intended to prevent such information from being divulged: rules concerning, for instance, vocational guidance, public health, poor law administration, social insurance and the public care of children. The rules are rather complicated and constructed in different ways. Sometimes they are absolutely prohibitive. Most of them, however, are applicable only in so far as they " have reference to the personal conditions of a private person "; even in such cases the documents should in most cases be delivered, if the authority feels confident that they will not be misused to damage or depreciate a private person. It is also noteworthy that in most cases the exceptions which provide for secrecy do not refer to documents containing decisions. There is a great number of cases in which the courts have upheld publicity in this field against administrative authorities. Most of them, however, concern the rights of persons having a personal interest in seeing the documents. It has been a very difficult problem for the legislator and the courts to handle the very grave conflicts which arise here.

It is important to observe that personal conditions are kept secret only in the cases enumerated by SA. There are many other documents which may reveal such information. It should be remarked particularly, that documents concerning the qualifications and the conduct of civil servants and other persons employed in public service are public. It is regarded as very important that the personnel policy of the authorities, concerning recruitment, promotion, payment, disciplinary treatment and so on, should be subject to public control, and public opinion reacts sensitively to errors in such questions. It is easily to be understood that the authorities have in many cases believed that they were entitled to withhold documents concerning such questions, particularly when they have contained information of a delicate character. But they have consistently been rebuffed in the courts.

FPA also considers the " economic interests " of private persons. Since public intervention has become more and more intensified, the authorities gather steadily increasing sources of information about economic life: about the fortune and income of private persons, about the economic conditions of enterprises: production, commerce, business connections, soundness and what not. The publicity of documents containing such information became for the first time problematic, as soon as—about fifty years ago—income tax was based on self-assessments: they were made secret (SA 17), but not the decisions of the authorities and not the documents in appeal cases.

The prescription on self-assessments has been followed by a great number of other exceptions. One cannot, for instance, investigate the economic conditions of private persons or enterprises in the documents of the officers who control guardianships (SA 15), nor in the raw materials, which have been collected for statistical purposes (16), nor in the offices which control banking, insurance, etc. (18), nor in the State Railways or Custom offices (28). Several authorities are instituted to render services to private persons: furnish them with information, carry out scientific investigations, lend money and support them in other ways. In such situations the Government is entitled to prescribe secrecy (SA 21, 27, 32). This applies also to authorities which have to control production, commerce and other sorts of private enterprises (SA 32). The construction of these exceptions is varying. Sometimes documents are kept secret only when their production may be injurious. In many cases the secrecy does not apply to the decisions of the authorities, only to other documents.

It has been a difficult task to settle the scope of publicity for documents concerning business connections between the State and the communities, on one side, and private persons, on the other. It is important to protect the economic interests of both parties, but, on the other hand, public control over abuse of powers and undue favour to private persons is regarded as of the utmost importance. SA 34 makes a compromise, the principal rule being that documents concerning such affairs *may* be kept secret till a contract has been concluded. Offers *should* not, as a rule, be publicised before that date. Even after a contract has been concluded documents may be exempted from publicity but only if the authorities find that there are " reasons " for keeping them secret. The courts have maintained the standpoint that such decisions should not be general but concern special cases. And they have inquired whether the reasons adduced have been valid and relevant.

PRODUCTION OF PUBLIC DOCUMENTS

When and under what conditions does a paper acquire the character of an official document? To answer this question we have to follow the distinctions made by FPA.

First, it mentions documents which have "been received by" an authority. These are the documents which are most often asked for: for example applications, notifications, observations and appeals from private persons, orders, rules, reports, notices which have come from one authority to another, archives delivered from authorities to the Record Office. Sometimes it may be doubtful whether a document has been sent from one authority to another or should be regarded as produced within one authority. Decisions on what is "one" authority have, in practice, been rather rigorous.[21] It does not matter if a document has a more or less preliminary character.[22]

One important distinction should, of course, be drawn: if I write personally to a civil servant my letter is not an official document. Out of fear of publicity private persons and civil servants are often inclined to use this form (*cf.* p. 59). In this way, however, publicity may easily be set aside. And if a "private" letter is asked for, the courts will examine thoroughly its real content and purport; on many occasions the authorities have had to deliver such letters, for instance letters containing information on civil servants in questions of promotion and in disciplinary affairs. The practice of the courts does not, however, make the principles for judging these delicate questions clear. Sometimes it has been claimed that private letters should be public only if they have influenced a decision; this would mean, however, that publicity would not—against the principles of FPA (see p. 55)—work at the stage when a decision is being prepared. On the other side a very rigorous principle has been asserted: a private letter should be regarded as secret only if it is obvious that it has no importance for questions which the authority has to deal with. It is undisputable that he who sends a letter has no general right to make it a condition that it shall be kept secret,[23] but it is not so clear whether his intentions should always be regarded as irrelevant.[24]

[21] The technical marine consultant who is attached to the Board of Commerce (one of our central offices) has been regarded as a separate authority and, consequently, a report he made to the Board concerning an average should be public.

[22] A commission set up to negotiate with organisations of civil servants asked the central offices concerned to give their opinions as to desirability of certain changes as to emoluments. One organisation concerned asked one of these offices for its memorandum. That this was refused was regarded as against the law.

[23] Otherwise in the United States. Cross, *op. cit.*, pp. 78 *et seq.*

[24] A light may be thrown on the rigorousness of practice by an affair which was very much discussed some years ago. The inspector of the infantry had inspected a regiment, and afterwards a number of "private" letters were exchanged

"A document shall be deemed to be received by an authority [and consequently: be public] when it has been delivered to the authority or to an official who has the duty to receive the document or is otherwise concerned with the case or the matter to which the document is related" (FPA II: 5). Not seldom the authorities will claim that a document has not really been "received." They will for instance feel that they ought not to have to produce it before it has been duly noted in a diary. But this is against the law. It is important from its viewpoint that the documents should be available at the very moment when they have come in. Otherwise publicity cannot be brought into effect promptly enough.

The second category of official documents consists in those which are prepared by an authority. Here these subdivisions are to be distinguished.

(*a*) Documents which are issued from an authority—containing for instance a decision on a report or an information—are available as soon as they are issued (FPA II: 5); this means of course that a copy should be delivered.

(*b*) "Diaries, journals, registers and other similar lists" are public as soon as "they have been made ready for entry and posting." This means that every annotation is public as soon as it has been made.[25] Special rules are given for different sorts of minutes (FPA II: 5, 6).

(*c*) Publicity is considerably more restricted for papers which are prepared within an authority and remain there. In principle also such documents are public.[26] But a document related to "a certain case or matter" does not acquire the character of an official document before a decision is taken in this "case or matter" (FPA II: 5). As long as a question is treated in an authority, one cannot ask for it; parties' rights (see p. 54) may, however, go further. And there is one more restriction: "A memorandum or other note drawn within an authority solely for reporting and preparing a case or matter

between the commander of the Army and other authorities, discussing what had happened at this inspection, the behaviour of the inspector and so on; it was established that the letters were public documents. In another case a bishop was asked to produce a letter in which a clergyman asked for advice in some difficulties he had with a parishioner. He was entitled to refuse but I believe this was only because of the specific personal character of the relations between the bishop and the clergy in his diocese.

[25] The Public Record Office has, in the interest of historical research, to compile registers of old seals. Somebody wanted to see the copies made and appendant annotations, though the collection was not yet complete. They had to be produced.

[26] So for instance a report delivered to the Civil Defence Office by its "inspector of training" (in so far as it did not clash with the special prescriptions on military secrecy) and a "confidential" report drawn within the office of the Governor of Stockholm containing observations on the conduct of a civil servant belonging to the office (who was afterwards dismissed).

for decision shall not be deemed to be an official document . . . unless, after the case or matter has been settled by the authority, the note is placed on permanent record" (FPA II: 4). Evidently, at this point too—as well as concerning documents which are received—the legislator had to make a distinction between official documents and papers which should be regarded as not official. Admittedly the solution is ambiguous. And the practice in the authorities cannot be expected to be uniform.

FPA does not prescribe that this or that document shall be preserved, or kept in this or that authority. Documents may for instance be handed over to the private persons concerned. Or they may be destroyed; in the prescriptions on "weeding out" in the archives, great respect is, however, paid to publicity (there is for instance a tendency to provide for secret documents not being destroyed before the date when they should become public).

To have access to a document you have to address yourself to the authority which keeps it for the time being. It may belong to authority A but be kept accidentally or temporarily by authority B. B cannot then be excused on the ground that the document is not its concern. One cannot on the other hand demand that A should obtain it from B in order to produce it.

There are two forms for producing documents. They may be made available "for examination by any person who desires to read or copy it at the place where it is kept." Or the applicant may "obtain a copy of the document for a fixed fee." As a rule he may choose between these forms (FPA II: 8).

It may take some time to prepare a copy. But if you only want to see the document or copy it yourself, it shall be "made available immediately or as soon as possible" (FPA II: 8). Here again the interest that the law takes in speedy action is manifested, and the courts take this rule seriously.

This interest is also the reason for the prescriptions in II: 9. According to them the authority itself has, in principle, to decide whether a document shall be produced or not. But it might take some time to procure such a decision. Now in most authorities "a specific official is entrusted with the care of a document." In order to hasten the production of a document "he himself shall decide whether the document shall be produced"; the applicant may address himself to him quite informally and orally. The official who has the document in his care and is, consequently, responsible for producing it, is supposed to decide immediately, without time-consuming deliberations, whether the document is public or not. This system cannot, however, be upheld without some modifications.

The text quoted supposes that it is not always possible to produce the document " immediately." The document is perhaps in the hands of an official who is actually working with it. It cannot, then, as a rule, be required that he should set his work aside. But then the document shall be produced " as soon as possible." And this clause is understood strictly. On several occasions the courts have insisted that the necessity of working with the documents should not be adduced unfairly in order to avoid publicity.

It may also be difficult for the official to whom the request is directed to make his decision. The official mentioned in FPA II: 9 (see above) is usually a rather subordinate one. " In doubtful cases," not in others, he shall therefore refer the question to the authority itself for decision, " provided that this is possible without undue delay." The authority may also have issued instructions, to which he must conform. And if he refuses, the question shall at the request of the applicant be referred to the authority (II: 9). Obviously the question must be referred to the authority—perhaps to another authority—in such cases where, according to SA, the production is discretionary (see p. 62).

The prescriptions quoted suppose that the question, whether a certain document should be produced, has not to be decided previously, before a request is made. Obviously it may, however, be practical to consider the question in advance. As a matter of fact secret documents are in different ways distinguished from public ones; they may for instance be kept in separate depositories. Documents may also, in a way prescribed by FPA II: 14, be provided with annotations—usually in the form of " red stamps "—indicating that they are secret. Such arrangements are, however, as a rule, not binding; they are, legally, only warnings to be careful. It may happen, for instance, that an authority, A, has regarded a document it sent to another authority, B, as secret and, in consequence, marked it as such. But if somebody asks for the document in B, this authority has to make its decision independently. The authority (or the official) whom an applicant actually meets should have the full responsibility for the decision. It may be that conditions have changed since A stamped the document, or that A and B are of different opinions or, simply, that A, to feel safe, used the stamp somewhat more often than was necessary, especially when it would have been a waste of time to consider the question thoroughly. We have taken the risk that in this way sometimes obvious mistakes will be made, since B will in many cases be less competent than A.

Such risks cannot, however, always be taken. Where secrecy is " of particular importance to the security of the realm," the Government may prescribe that the " red stamp " made by one authority shall be binding upon other authorities. Such powers have been given only for documents concerning relations with foreign powers and defence.

A person who feels or suspects that " something is wrong " may, sometimes, not be able to point out specific documents containing the information he wants. He can in such cases claim a certain amount of help in the authority to which he addresses himself. The " service " the authorities are obliged to render (see p. 57) is important also in this respect. In this connection stress has been laid on keeping good and complete diaries in which information about documents received in the authorities is easily available.

I have mentioned that we lay stress on the responsibility of officials and authorities in applying FPA and SA. This responsibility is to be taken *stricto sensu*. Against the official who produces a secret document or refuses to produce a public one a penal action may be brought before a criminal court—where, it is true, penalties other than pecuniary ones will very seldom be thought of. The criminal responsibility of civil servants and other officers is a cornerstone of Swedish public law.[27] The general courts have played an important role by settling, in an uncountable number of criminal cases, the duties of public officers. This is also true about publicity.

Most often such questions have been raised by the two Procurators, which are appointed by the Parliament, the one, the Procurator of Civil Affairs, to supervise the courts and the civil service, the other, the Procurator of Military Affairs, to supervise military officers—both of them generally lawyers of high standing.[28] They are especially charged to intervene when administrative and judicial practice seems to " imperil the general rights of the citizens "; accordingly they watch attentively over the publicity of documents, acting when private persons complain or on their own initiative. Among the best sources for studying FPA II and SA in practice are the annual reports of the Procurators, where questions they have handled are reported and discussed exhaustively. In these reports also questions are reported where the Procurators, though they have found that the authorities have been wrong, have not regarded the errors committed as grave enough to cause a penal action. Of course the statements of the Procurators have, legally, no binding force, but the criticism they express is of a considerable moral weight, owing to the great esteem they enjoy, and is regarded as a sort of authoritative guidance for administrative practice.

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[27] Herlitz, *Revue Internationale des Sciences Administratives*, 1953, pp. 550 *et seq.*

[28] In my book *Sweden, A Modern Democracy on Ancient Foundations*, pp. 63, 118 and in *International and Comparative Law Quarterly*, 1953, p. 230, I have called the Procurators " Solicitors-General." The Swedish terms " justitieombudsman " and " militieombudsman " cannot be directly translated.

There is also another remedy that a person may seek when he has in vain asked for a document. The general remedy of administrative appeals[29] is since 1937 open to him. In the last resort he will then, if the question does not apply to documents kept in the general courts, have it decided by the Court of Government (the supreme administrative court); SA 10–13.[30] Some remarkable advantages which this way affords should be emphasised. Firstly, its procedure is, as always, simple. The applicant does not need the assistance of a lawyer, he acts merely in writing and the expenses are very small, if any. Secondly, it is a general principle in Swedish law that administrative courts do not consider merely the legality of administrative acts; they have, in appeals brought before them, the power to judge the case as comprehensively as the authority which made the initial decision. In questions of publicity the scope is not quite so wide. It may be difficult to define it exactly. But it is beyond any doubt that when SA uses very vague words, they will be applied as understood by the court. Thirdly, " a case or matter regarding production of official documents shall always be dealt with promptly " (FPA II: 13).

Studying the practice of the Procurators, the general courts (in criminal cases) and the Court of Government one may be struck by the fact that there is not a very great number of complaints. It has often been observed that the Court of Government has not had as much to do as was expected in 1937. Above all the newspapers seem not to have cared generally to have legal questions settled in this way. In most controversial cases those who were active seem to have had a personal interest in having access to documents. The inactivity of the press may easily be understood. They want, as a rule, to see the documents immediately. If they are not produced at once, they do not take a very great interest in having them later on, when the topic in question has lost its actuality. It is, however, to be regretted that in this way such questions, where the public interest in publicity—which is the gist of FPA (see p. 54)—comes into conflict with other interests, are not so often solved by the courts as they could be. There may, however, be another explanation of the scarcity of judicial decisions. It may be that, in general, the authorities apply the rules on publicity in such a way that there is no very great need to apply to the courts.

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[29] Herlitz, *International and Comparative Law Quarterly*, 1953, pp. 228 *et seq.*, *Revue Internationale des Sciences Administratives*, 1953, pp. 554 *et seq.*, 556 *et seq.*

[30] But against decisions of a minister there is no remedy. *Op. cit.*

CURRENT SURVEY

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This digest, which has been compiled by the Editor, covers the period from October 1, 1957, to December 31, 1957.

UNITED KINGDOM

COMPULSORY PURCHASE

Number of orders

Housing Act, 1936, Part V, and Town and Country Planning Acts. The Minister of Housing and Local Government stated the number of compulsory purchase orders made under these Acts for the years 1950 to 1956, and the acreage covered. Under the Housing Act, the number was 574 (acreage 4,460) in 1950, and 214 (acreage 852) in 1956; the comparable figures under the Planning Acts were 51 (acreage 235) and 33 (acreage 57) (580 H.C. Deb. *124*, December 20, 1957).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 93).

COURTS

High Court and Court of Appeal

Account of receipts and expenditure, 1956–1957, has been published by the Lord Chancellor's Department.

Legal Aid

Seventh Report of the Law Society of Scotland, for 1956–1957 has been published by the Scottish Home Department (H.M.S.O. 49–373–7).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 93).

CRIMINAL LAW

Statistics

The Criminal Statistics, England and Wales, 1956, have been published (Cmnd. 286).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Fishing industry

Inquiry. The Minister of Agriculture, Fisheries and Food stated that Sir Alexander Fleck had agreed to act as chairman of the Committee of Inquiry with these terms of reference: "To assess, in relation to developments in fishing and to marketing of fish, the size and pattern, and implications of an economic fishing industry in the U.K., and to report." (578 H.C. Deb. 805–807, November 25, 1957; and see [1957] P.L. 356.)

Ministers' Functions

Agriculture, Food and Fisheries. On December 9, 1957, the House of Commons debated the Delegation to County Agricultural Executive Committees (Amendment) Regulations, 1957 (S.I. 1957 No. 1602) and the Arton

Wilson Report (579 H.C. Deb. 1025–1036; and see [1956] P.L. 254, 372; [1957] P.L. 372).

Burden on Ministers. The Prime Minister stated that he had received the views of the Committee; that he did not think it would be their wish that the report should be published (575 H.C. Deb. 25–26, October 29, 1957). The Prime Minister later stated that no further inquiry was needed. The recognition that junior Ministers were to be regarded as deputy Ministers was probably the biggest single contribution that could be made to the reduction of the burden on certain senior Ministers. Ministers of State and Parliamentary Secretaries might take an increasing part of the work on Bills and other matters (577 H.C. Deb. 26–28, November 5, 1957).

Health. Part I of the Report of the Ministry for 1956 has been published. Section 1 deals with the National Health Service (including a Chapter on International Health). Section 2 deals with Welfare, Food and Drugs, and Civil Defence (Cmnd. 293).

Lord President of the Council. The Prime Minister stated that the Lord President, like his predecessor, would be responsible for D.S.I.R., the Medical Research Council, the Agricultural Research Council and the Nature Conservancy; and that it was in accordance with precedent for such duties to be combined with those of head of a political party machine (575 H.C. Deb. 29–30, October 29, 1957).

Post Office. The Commercial Accounts and Report for 1956–1957, including accounts of the postal, telegraph and telephone services have been published, together with the report of the Comptroller and Auditor General thereon (H.C. 14 of 1957–1958).

Wales. See below, p. 96.

New Towns

Debates. On November 20, 1957, the House of Lords debated the development of new towns (206 H.L. Deb. 410–444). On November 28, 1957, the New Towns Bill was debated on Second Reading in the House of Commons (578 H.C. Deb. 1309–1399).

Reports for 1956–1957 have been published of the Development Corporations of Aycliffe, Basildon, Bracknell, Corby, Crawley, Cwmbran, Harlow, Hemel Hempstead, Peterlee, Stevenage, Welwyn Garden City and Hatfield (H.C. 249 of 1956–1957).

Statistics. The Minister of Housing and Local Government gave detailed figures relating to Ministerial advances, and costs of building (578 H.C. Deb. 982–986, November 26, 1957).

Research

See **Ministers' Functions,** *Lord President of the Council* (above).

Scientific policy

Report. The tenth annual report, 1956–1957, of the Advisory Council on Scientific Policy (Chairman: Professor Sir Alexander Todd) has been published (Cmnd. 278).

Security

Telephone communications (interception). On October 31, 1957, the Prime Minister stated that he had received the Report of the Committee of Privy Councillors, that the Government accepted all the recommendations and that arrangements were being made to give effect to those which called for a change in procedure (575 H.C. Deb. 398–399).

The committee's report stated that the origin of the power of the Executive to intercept communications could only be surmised, but the power had been exercised from very early times and had been recognised as lawful by a succession of statutes covering the last 200 years or more. The manner of its exercise had from time to time been the subject of public discussion, and in 1844 had been the subject of investigation by two secret committees, one of each House of Parliament, which inquired into the law respecting the detaining and opening of letters at the General Post Office, but both these committees had recognised the power as lawful.

The committee found some difference of view on the authority to intercept telephone messages; in one view it was identical with the power to open letters, in another, it rested on a comparatively modern statute.

It is today the invariable practice that the interception of communications is carried out only on the authority of the Secretary of State for Home Affairs (or, in the case of Scotland, the Secretary of State for Scotland) given by warrant under his own hand: the warrant sets out the name and address or telephone number of the person whose communications are to be intercepted. The Secretary of State has to satisfy himself, on the facts of each particular case, that it is proper to issue his warrant. In practice, the principle on which he acts is that the purpose of the interception must be either to detect serious crime or to safeguard the security of the State.

The power of interception is now almost exclusively exercised, under warrant from the Secretary of State, by the Metropolitan Police, the Board of Customs and Excise and the Security Service; the committee found that " it is used with the greatest care and circumspection, under the strictest rules and safeguards." They were satisfied that " the Secretaries of State and all the officials concerned have taken, and continue to take, scrupulous care to ensure the strict observance of the purposes to which it is intended by the Home Office that the interception of communications should be directed and confined "; that " interception is highly selective and is used only where there is good reason to believe that a serious offence or security interest is involved "; and that " the use of the power has been effective in detecting major criminals and preventing injury to national security." They recommended that the exercise of the power in these limited spheres should be allowed to continue under the same strict rules and supervision: " the criminal and the wrongdoer should not be allowed to use services provided by the State for wrongful purposes quite unimpeded, and the Police, the Customs, and the Security Service ought not to be deprived of an effective weapon in their efforts to preserve and maintain order for the benefit of the community." In the opinion of the committee, " the interference with the privacy of the ordinary law-abiding citizen or with his individual liberty is infinitesimal, and only arises as an inevitable incident of intercepting the communications of some wrongdoer. It has produced no harmful consequences."

The committee reached the conclusion, however, that, in the Marrinan case, which had given rise to the investigation, the decision of the Home Secretary, Lord Tenby, to permit the disclosure of information contained in telephone intercepts to the Bar Council and the Benchers of Lincoln's Inn was a mistaken decision, though there could be no doubt that it was " wholly governed by considerations of the public interest." They recommended that " in no circumstances should material obtained by interception be made available to any body or person whatever outside the public service."

Among other safeguards which the committee recommended should be adopted were:

that there should be a regular review of outstanding warrants not less than once a month;
that warrants should be valid only for a stated period;
that each warrant should relate only to one individual, of whom particulars should be specified;
that full records should be kept in the Home Office in each case;
that there should be no extension of the powers of interception beyond those existing powers which the committee has defined.

While agreeing with other members of the committee on their main conclusions and recommendations, Mr. Gordon Walker made reservations on the continued use of the existing power of interception in view of public repugnance. He considered that the power should be used for the detection of crime only in the most rare and urgent cases, such as the apprehension of dangerous criminals or lunatics; and for security purposes only for direct counter-espionage and protection of high secrets of State, or for the prevention of the employment of fascists or communists on work vital to the State (the two purposes, he added, for which the Security Service at present mainly intercepts communications).

The Report is contained in Cmnd. 283. The above summary is extracted from Commonwealth Survey, C.O.I., November 12, 1957. (See also [1957] P.L. 254–256.)

Tribunal of Inquiry

Bank rate. On November 12, 1957, questions were asked in the House of Commons concerning the communication on September 18, 1957, of the intention to increase Bank Rate. The Chancellor of the Exchequer stated that there was no leakage of the increase and that no prior information was given to anyone who was not inside his Department or his own advisers. On November 13, 1957, the Prime Minister made a statement in which he said that in the course of supplementary questions made the day before imputations were made, or at least implied, on the honour of the Chancellor of the Exchequer and against the character and probity of Mr. Oliver Poole; and that he had decided that an inquiry should be held. On November 14, 1957, the Prime Minister moved: " that it is expedient that a Tribunal be established for inquiry into a definite matter of urgent public importance, that is to say, whether there is any justification for allegations that information about the raising of Bank Rate was improperly disclosed to any person, and whether if there was such disclosure any use was made of such information for the purpose of private gain." The tribunal was to be set up under the Tribunals of Inquiry (Evidence) Act, 1921. After debate, the motion was agreed to. (577 H.C. Deb. 765–768, 964–969, 1147–1172; see also 206 H.L. Deb. 321–323, November 13, 1957, and 369–374, November 14, 1957.)

HOUSING

Debate

In the course of the debate on the Address in reply to the Queen's Speech, the House of Commons debated an opposition amendment on housing (577 H.C. Deb. 612–738, November 11, 1957).

Requisitioned property

The Ministry of Housing and Local Government has issued a Circular (No. 53/57) about the calculation of Exchequer grant, *re* housing liability, rents, and the leasing and purchasing of houses, under the Requisitioned Houses and Housing (Amendment) Act, 1955.

See also COMPULSORY PURCHASE (above, p. 70).

INQUIRIES

Bank Rate

See above, this page.

Transport

Air. The Report has been published of the court investigation of the accident to Viking G–AJBO on May 1, 1957, near Blackbushe Airport. The Report is dated October 17, 1957 (C.A.P. 146).

Railway. The Reports have been published (a) of the collision on February 9, 1957, at Chapel-en-le-Frith (dated July 10, 1957), (b) of the collision on April 15, 1957, at Portsmouth and Southsea Station (dated September 12, 1957).

The Report has been published on the accidents which occurred on the railways of Great Britain during 1956. The Report is dated August 7, 1957 (H.M.S.O. 55–204–0–56).

LOCAL GOVERNMENT

Finance

Rating and valuation. The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955; *Wearmouth Colliery Welfare Fund* v. *Sunderland County Borough Council* (1956) 1 R.R.C. 272; *Wearmouth Colliery Cricket Club* v. *Sunderland C. B. C.* (1956) 1 R.R.C. 277; various *Welfare Clubs* v. *Stoke-on-Trent Corporation* and *Repertory Players* v. *Same* (1957) 1 R.R.C. 353; *National Allotments & Gardens Society* v. *St. Pancras B. C.* (1957) 1 R.R.C. 360; *Independent Order of Oddfellows Manchester Unity Friendly Society* v. *Manchester Corporation* [1957] 1 W.L.R. 1059; *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council* [1957] 1 W.L.R. 1080; *St. Pancras Borough Council* v. *University of London* [1957] 1 W.L.R. 1214; *Berry* v. *St. Marylebone Borough Council* [1957] 3 W.L.R. 1029; *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council* [1957] 3 W.L.R. 1039; *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* [1957] 3 W.L.R. 1048.

In *John Walsh, Ltd.* v. *Sheffield Corporation* [1957] 1 W.L.R. 1074, the Court of Appeal *held* that before the coming into force of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which by section 2 (1) expressly confers such a power, a rating authority had no *locus standi* under section 40 (1) (*b*) of the Local Government Act, 1948, to make a proposal for the alteration of the valuation list by the addition of a hereditament not included in the list.

On the interpretation of Rating and Valuation (Apportionment) Act, 1928, s. 3, see *London Transport Executive* v. *Betts* (*Valuation Officer*) [1957] 1 W.L.R. 988.

In LONDON COUNTY COUNCIL *v.* WAND (1957) 50 R. & I.T. 689, the appellant council appealed against the assessment of the rateable value of its Becontree estate, on which there were 26,000 houses, which were built under statutory powers and were let at all material times at subsidised rents. The Lands Tribunal, upholding the assessment, *held* that the wages of the tenants in 1939 were irrelevant, but that the rents of comparable neighbouring houses, which were privately owned, were relevant to the inquiry and that the correct multiplier, to convert a weekly rent into a yearly one, was fifty-two. Further, the actual amount of rates paid in 1939 must be deducted from this yearly rent to determine the actual net rent in 1939, although the pre-war revaluation had been postponed. The Council's services outside the curtilage of the houses were properly disregarded. Finally the facts that demand and supply were equally balanced in 1939 but that there was a long waiting list in 1956, which was not unconnected with industrial development in the area since 1939, were matters to be taken into account under section 2 (3) (*b*) of the Valuation for Rating Act, 1953.

Statistics. The Ministry of Housing and Local Government has published the Local Government Financial Statistics, England and Wales, 1955–1956 (H.M.S.O. 75–10–0–56).

Investment

Restriction. The Ministry of Housing and Local Government has issued a Circular drawing the attention of councils to the Government's declared intention to stabilise total capital investment in the public sector at its present level, in money terms, during the financial years 1958–1959 and 1959–1960, and explaining how the application of this policy would affect those local government services for which the Ministry is responsible (Circular No. 54/57 dated November 11, 1957).

Powers

The following observations apply to section 21 of the Town Police Clauses Act, 1847, and section 46 of the Road Traffic Act, 1930, which deal with the powers of corporations to make traffic regulations for the purpose (*inter alia*) of preventing obstructions:

1. Section 21 of the Act of 1847 applies to all cases of crowding in the streets and the courts have thought that the powers entrusted to local authorities under the section ought to be given a wide construction.
2. Whereas section 21 of the Act of 1847 provides for something which can be done on the undivided and unrestricted authority of the local council, section 46 of the Act of 1930 contemplates (*inter alia*) the creation of one-way streets by order made by the appropriate authority and confirmed by the Minister.
3. Section 21 of the Act of 1847 cannot properly be used by a local authority without any local inquiry, and with no restriction at all, as a sort of trying-out ground for the question whether an order should be made under section 46 of the Act of 1930.

The Poole Corporation made an order creating one-way traffic in certain streets for all vehicles for a period of six months. The corporation purported to make the order under section 21 of the Town Police Clauses Act, 1847, and not under section 46 (2) of the Road Traffic Act, 1930. *Held,* the procedure of making an order under section 21 of the 1847 Act as a preliminary to an order under section 46 (2) of the 1930 Act was neither desirable nor permissible and was *ultra vires* the powers of the corporation and void: BROWNSEA HAVEN PROPERTIES *v.* POOLE CORPORATION [1957] 3 W.L.R. 669; [1957] 3 All E.R. 211, Vaisey J.

Reorganisation

Debate. The Local Government Bill was debated on Second Reading in the House of Commons on December 9 and 10, 1957 (579 H.C. Deb. 905–1022, 1091–1214).

London. The Prime Minister gave the names and terms of reference of the Royal Commission on Reform of London Local Government. The chairman is Sir Edwin Herbert. The terms of reference are: "To examine the present system and working of local government in the greater London area: to recommend whether any, and if so what, changes in the local government structure and the distribution of local authority functions in the area, or in any part of it, would better secure effective and convenient local government; and to regard, for these purposes, local government as not including the administration of police, or of water, and the Greater London area as comprising the Metropolitan Police District together with the City of London, the Boroughs of Dartford, Romford and Watford, the Urban Districts of Caterham and Warlingham, Chorley Wood, Hornchurch, Rickmansworth and Walton and Weybridge, and the Parish of Watford Rural in the Watford Rural District." (578 H.C. Deb. 202–203, November 19, 1957; see also 578 H.C. Deb. 974–975, November 26, 1957, and 1289–1290, November 28, 1957; see also [1957] P.L. 360.)

See also COMPULSORY PURCHASE (above, p. 70), HOUSING (above, p. 73), TOWN AND COUNTRY PLANNING (below, p. 92).

MONOPOLIES AND RESTRICTIVE PRACTICES

Restrictive Practices Court

Direction. The President of the Court has given the following general direction: Applications in England and Wales to extend or abridge the time prescribed by the Restrictive Practices Court Rules, 1957, or by order of the court may until further order be dealt with by the clerk of the court who may at his discretion either dispose of the same or adjourn them to the judge [1957] 1 W.L.R. 1182.

Hearings. On October 29, 1957, the Attorney-General stated that he was not yet able to say when the first case would be heard by the Court. Notices of Reference had been issued in twenty-five cases and Representation Orders had been obtained in eighteen of them. In five cases the Registrar had granted extensions of time for delivery of respondents' Statement of Case. (575 H.C. Deb. 27.)

Restrictive trading agreements

Registration. The Registration of Restrictive Trading Agreements Order, 1957 (S.I. 1957 No. 2158), has been approved.

This Order, which comes into operation on the 31st day of December, 1957, appoints the day on which all restrictive trading agreements not covered by the Registration of Restrictive Trading Agreements Order, 1956, become subject to registration under Part I of the Restrictive Trade Practices Act, 1956.

The period, within which particulars relating to agreements are to be furnished to the Registrar of Restrictive Trading Agreements, is three calendar months.

In the case of an agreement which is not subject to registration by virtue of this Order by reason only that the restrictions accepted under it relate to the supply of goods by export from the United Kingdom or to export and overseas trade, the provisions of subsection (1) of section 31 of the Act will apply.

The new Order covers all agreements not covered by the first Order and includes those which involve restrictions on the quantity or type of goods which may be produced or sold or which involve the division or sharing of markets or areas between suppliers (see also 579 H.C. Deb. 129–138, December 2, 1957 206 H.L. Deb. 1024–1034, December 11, 1957; [1956] P.L. 378).

NATIONAL HEALTH SERVICE

Finance

Costs. The analysis of running costs of hospitals in Scotland for 1956–1957 has been published (H.M.S.O. 49–394–0–57).

Liability

Smoke nuisance. Hospitals provided for the purposes of the National Health Service Act, 1946, are "premises occupied for the public service of the Crown" within section 106 of the Public Health Act, 1936, and the management committee thereof is not amenable to the jurisdiction of the justices under section 103 of the Act in respect of a smoke nuisance.

Justices made an order under section 103 of the Public Health Act, 1936, requiring the appellants to abate a nuisance arising at the General Hospital, Nottingham, from a chimney emitting black smoke. The hospital was vested in the Minister of Health under the National Health Service Act, 1946. *Held,* that the hospital constituted "premises occupied for the public service of the Crown" within the meaning of section 106 of the 1936 Act and the justices had no jurisdiction to make the order: NOTTINGHAM NO. 1 AREA HOSPITAL MANAGEMENT COMMITTEE *v.* OWEN [1957] 3 W.L.R. 707; [1957] 3 All E.R. 358, D.C.

Remuneration

Royal Commission. Volume 1 of Written Evidence, containing a factual memorandum by the Ministry of Health and the Department of Health for Scotland, has been published (H.M.S.O. 72–32–1).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 70), PARLIAMENT (below, p. 84), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 93).

NATIONAL INSURANCE

Benefits

Regulations and reports. The following statutory instruments were approved by the National Insurance Advisory Committee, the reports of which are referred to in brackets: S.I. 1957 No. 1835 Child's Special Allowance (H.C. 290 of 1956–1957); S.I. 1957 No. 1830 Guardian's Allowances (H.C. 291 of 1956–1957); S.I. 1957 No. 1849 Hospital In-Patients (H.C. 2 of 1957–1958); S.I. 1957 No. 1870 Unemployment and Sickness Benefit (H.C. 3 of 1957–1958); S.I. 1957 No. 1888 General Benefit (H.C. 4 of 1957–1958); S.I. 1957 No. 1889 Overlapping Benefits (H.C. 5 of 1957–1958); S.I. 1957 No. 1949 Widow's Benefit and Retirement Pensions (H.C. 12 of 1957–1958); S.I. 1957 No. 2147 New Entrants Transitional (H.C. 25 of 1957–1958); S.I. 1957 No. 2146 General Benefit No. 2 (H.C. 26 of 1957–1958); S.I. 1957 No. 2164 Increase of Benefit and Miscellaneous Provisions (H.C. 33 of 1957–1958); S.I. 1957 No. 2179 Death Grant (H.C. 37 of 1957–1958).

Statutory amendment. The National Insurance (No. 2) Act, 1957 (6 Eliz. 2, c. 1), received the Royal Assent on November 28, 1957. Section 2 and the Fourth Schedule set out the new rates of benefits. A White Paper was published summarising the changes (Cmnd. 295) and the Government Actuary made a report (Cmnd. 294). For a statement by the Minister see 577 H.C. Deb. 153–166, November 6, 1957. For commencement dates see S.I. 1957 No. 2073.

An Order has been made bringing into operation on November 18, 1957, sections 3 (except subsection (1) (*b*)), 5, 6, 9 (1) (*a*) and Schedule of the National Insurance Act, 1957 (S.I. 1957 No. 1799). A second Order brings section 7 into operation on January 1, 1958 (S.I. 1957 No. 2178).

Classification

Regulations and reports. The following statutory instrument was approved by the National Insurance Advisory Committee, the report of which is referred to in brackets: S.I. 1957 No. 2175 Classification (H.C. 35 of 1957–1958).

Contributions

Regulations and reports. The following statutory instruments were approved by the National Insurance Advisory Committee, the reports of which are referred to in brackets: S.I. 1957 No. 2176 Contributions (H.C. 36 of 1957–1958); S.I. 1957 No. 2177 Residence and Persons Abroad (H.C. 36 of 1957–1958).

Statutory amendment, Section 2 and the Third Schedule of the National Insurance (No. 2) Act, 1957 (see above), set out the new rate of contributions, Cmnd. 294 and 295 (see above) also refer.

Decisions of the Commissioner and the Tribunal

Availability for employment. An unqualified accountant, registered for employment as an accountant, was also self-employed in evening accountancy work. On appeal to the Commissioner he stated he was prepared to accept full-time clerical work in any capacity. *Held,* that the claimant's evening accountancy work was different in nature from the general clerical work for which he was available: Decision No. R(U) 12/57.

An Italian woman had a permit to stay in this country subject to certain conditions. She did not comply with these conditions, the permit was withdrawn and she was ordered to leave the country by a certain date. She claimed unemployment benefit after that date. *Held,* that she was not available for employment until she was notified that the deportation order was revoked. She had no right to be here and no right to be employed in the period in question: Decision No. R(U) 13/57.

A newly-married woman who had previously been employed full-time as a domestic servant, restricted her availability to part-time domestic work to enable her to look after her husband. There was no such work in her district and consequently she had no reasonable prospect of securing employment. *Held,* that for a claim to succeed in these circumstances claimant must satisfy one or other of the conditions specified in paragraphs (i)–(iii) of Regulation 6 (1) (*aa*) of the National Insurance (Unemployment and Sickness Benefit) Regulations. Paragraphs (i) and (ii) were not relevant in her case and she could not satisfy the condition in paragraph (iii). Her claim must, therefore, fail: Decision No. R(U) 17/57.

Death outside Great Britain. Regulation 5 (*h*) of the Death Grant Regulations, 1949, provides that a death grant is payable in respect of a death occurring outside Great Britain if the deceased immediately before death was . . . the husband . . . of a person who, had he [*i.e.,* that "person," in this case the claimant] then died, would have satisfied certain conditions, and such husband . . . was then resident with that person.

A man died in South Africa and his widow claimed death grant. The local tribunal decided that, as she had become entitled to widow's benefit on her husband's death, Regulation 5 (*h*) of the Death Grant Regulations, 1949, was satisfied. *Held,* that as that Regulation concerned the position of the wife immediately before the death of the husband and she could not at that time, have been entitled to widow's benefit, the local tribunal fell into error: Decision No. R(G) 6/57.

Detention in legal custody. Whilst serving a prison sentence, the claimant was transferred as a Broadmoor patient to a mental hospital under section 2 (1) of the Criminal Lunatics Act, 1884. When her sentence was about to end, an order was made under section 7 of that Act. The order took effect upon the ending of the prison sentence (upon which the claimant ceased to be a Broadmoor patient) and under the order her detention in the same hospital continued. Retirement pension was claimed from the ending of the prison sentence. *Held,* that after the end of the prison sentence the claimant's legal status was identical with that of a person who had never been the subject of legal proceedings and she was no longer to be regarded as detained in legal custody for the purposes of the National Insurance Act, 1946. Decision R(S) 9/56 reversed: Decision No. R(P) 2/57.

Earnings. A widow working as a cleaner failed to declare the full amount of her earnings and later stated that she paid the difference to her daughter who, unknown to the employer, helped her in her work. *Held,* that her payment for her daughter's assistance was not admissible as an expense incurred in connection with the employment. The claimant's failure to make true declarations or enquire about her position were not consistent with good faith: Decision No. R(G) 5/57.

Leaving voluntarily. An apprentice electrician was ordered to do some work of a kind [which he had done before but] which his employer had, in effect, admitted to be outside the proper scope of his apprenticeship. He objected and was given the alternative of leaving. He chose to leave. *Held,* that the claimant had just cause for leaving voluntarily: Decision No. R(U) 18/57.

Misconduct. An airframe fitter was discharged when a customer complained about the claimant's drunkenness which had occurred outside working hours whilst lodging in the customer's premises. The employers agreed that there were other contributory reasons for his dismissal. *Held,* that the claimant had lost his employment through his misconduct. That it was not the sole reason for his dismissal was not relevant: Decision No. R(U) 14/57.

Seasonal worker. A man worked for over three years as a greenkeeper at a golf club during the summer and as a billiards marker during the winter. His work as billiards marker was a subsidiary occupation and the days on which he followed it were treated as days of unemployment. *Held,* that although, for benefit purposes, claimant was properly treated as unemployed in the winter, he was in fact employed and was therefore not a seasonal worker: Decision No. R(U) 19/57.

Share fisherman. A share fisherman claimed benefit on the ground that the state of the weather prevented his boat putting to sea. Other vessels from the same port did put to sea. There was an alternative route to the fishing ground which was sheltered but took longer. *Held,* that, as the alternative route was practicable, it could not be said that the weather had prevented the boat putting to sea. A contention by the claimant that the skipper's decision not to put to sea constituted good cause necessitating abstention from fishing on the part of crew members was rejected. The master and the crew are to be regarded as one unit: Decision No. R(U) 15/57.

A share fisherman had run out of bait for his usual style of fishing and an alternative method of fishing would be unsuccessful because, due to the previous bad weather, the water was too cloudy. *Held,* that the state of the weather did not prevent the boat putting to sea and that good cause necessitating abstention from fishing was not otherwise established either by the claimant's running out of bait or by the fact that the prospects of successful fishing by the alternative method were not good: Decision No. R(U) 16/57.

Trade dispute. The principle of the twelve days' rule was that an employee whose employment is indefinitely suspended within twelve working days of a stoppage of work at premises at which the employee habitually seeks work must prima facie be presumed to have lost employment by reason of the stoppage. This principle was applied for so many years in the interpretation of the provisions in the previous Unemployment Insurance Acts which are reproduced in section 13 (1) of the National Insurance Act, 1946, that the legislature must be taken to have intended the principle to be applied in the interpretation of section 13 (1).

Claimant was discharged from a shipyard the day before a stoppage of work began there. Under the twelve days' rule a presumption arose that he had lost employment by reason of the stoppage. *Held,* that the presumption was rebutted. The inference from the evidence was that the claimant's employment had terminated and was not merely indefinitely suspended. The twelve days' rule reaffirmed: Decision No. R(U) 20/57.

A plater's helper, who habitually sought employment at a shipyard, claimed benefit when his employment was indefinitely suspended. A stoppage of work, due to a trade dispute, commenced twelve weekdays later. He was unemployed until three weeks after the stoppage at the shipyard ended and then secured employment in a garage. *Held,* that the presumption raised by the twelve days' rule that he lost employment as a result of the stoppage at his place of employment was rebutted. Other men, suspended at the same time as the claimant, resumed work at the shipyard for short periods before the stoppage began and after it ended. The inference was that the claimant would not have been employed there during the period of the stoppage even if there had been no stoppage. *Held,* further, that twelve days means twelve consecutive weekdays excluding recognised or customary holidays: Decision No. R(U) 21/57.

A labourer at an engineering firm lost employment as a result of a stoppage of work due to a trade dispute at his place of employment concerning wage rates for manual workers. He was not a member of a trade union. The local tribunal recorded that it was not known whether any member of his grade was participating, financing or directly interested in the dispute. *Held,* that if, on the evidence, the answer to these questions is not known, the claimant has failed to prove a negative answer and there is no escape from the disqualification: Decision No. R(U) 22/57.

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Benefits

Statutory amendment. Section 1 and Second Schedule to the National Insurance (No. 2) Act, 1957 (see above, p. 77), set out the new rates of benefit.

Contributions

Statutory amendment. Section 1 and First Schedule to the National Insurance (No. 2) Act, 1957 (see above, p. 77), set out the new rates of contribution.

Decisions of the Commissioner and Tribunal

Accident. Claimant worked in a shed which was insufficiently heated and where a draught was frequently caused by doors being left open. He contracted influenza which later developed into bronchitis. *Held,* that the claimant did not suffer personal injury by accident. There were no exceptional identifiable incidents to be described as accidental. Influenza, being a virus infection, clearly did not result from the conditions of work. Any draught, by lowering the skin temperature, can contribute to the development of bronchitis, but this would occur in the case of any man who went to work on a cold day when suffering from the infection. Decision R(I) 3/51 distinguished: Decision No. R(I) 32/57.

Compensation supplement. Under section 1 (1) (*b*) of Workmen's Compensation and Benefit (Supplementation) Act, 1956:

"1.—(1) The persons to whom this Act applies are the following, namely,—. . .

> (*b*) any person who is, or has since the commencement of this Act been, entitled in respect of pneumoconiosis to weekly payments by way of workmen's compensation, being a person who is certified under a compensation scheme to be totally disabled or with respect to whom it is determined in accordance with regulations to be made by the Minister of Pensions and National Insurance (in this Act referred to as "the Minister"), that he is so disabled."

A coal-miner, who was suspended from employment in 1947 and awarded maximum compensation, although only partially incapacitated by pneumoconiosis, claimed compensation supplement. The Silicosis Medical Board refused to issue a certificate of total disablement. *Held,* that the claimant was not entitled to compensation supplement. He had failed to prove that he was totally disabled as a result of pneumoconiosis: Decision No. R(I) 29/57.

Claimant's left leg was amputated after an accident in 1925. He continued with his employers at a lighter occupation until 1949, when he had to retire. *Held,* that compensation supplement is not payable from August 29, 1956. It is because of increasing age and arthritis in his right knee unconnected with the accident that he is unable to earn at least £52 a year: Decision No. R(I) 33/57.

"Out of and in the course of employment." Leading stoker at a boiler house was injured in 1949 when a boiler exploded. He began to develop anxiety neurosis in 1955 and committed suicide in February, 1956. *Held,* that death was not the result of the 1949 accident. Deceased had continued working without any anxiety symptoms until December, 1955, and there was

no evidence to show that the accident was a contributory cause of the suicide: Decision No. R(I) 23/57.

A fireman employed by British Railways booked off duty at 1.30 a.m. at a town away from his home. He elected to stay the night at a hostel, provided by his employers, where he injured himself the following morning. *Held,* that the accident was an industrial accident. There was an implied obligation upon the claimant to go to the hostel for rest which was essential for his work as a fireman: Decision No. R(I) 30/57.

A district relief signalman was injured while travelling to take over duty at a certain signal-box. His employers considered he was on duty while travelling for which he was entitled to travelling allowance. *Held,* that the accident was not an industrial accident. He is not an exception to the general rule, enunciated in Decision R(I) 9/51, that employment begins at the place of work; he met with his accident on a route not prescribed in any way by the conditions of his employment: Decision No. R(I) 34/57.

A labourer employed by a dock company was injured while travelling to work by motor-cycle. He was obeying an order to arrive an hour earlier than usual. *Held,* that the accident did not arise out of the claimant's employment. He was travelling to work in the usual way and not in answer to any emergency summons. Decisions R(I) 21/51 and R(I) 27/56 distinguished: Decision No. R(I) 36/57.

Prescribed disease. A Public Health Inspector whose duties, in connection with rehousing, included visiting persons suffering from notifiable diseases including tuberculosis contracted tuberculosis. *Held,* that tuberculosis was not prescribed in relation to the claimant—inspection of houses is too far removed from the medical treatment or nursing of patients to be spoken of as a service ancillary to such treatment or nursing: Decision No. R(I) 28/57.

Procedure. Claimant agreed that the local appeal tribunal could be constituted differently when, after an adjournment, it sat a second time to hear his case. The tribunal again adjourned and at its third meeting there was a fresh member. The claimant was not asked if he agreed to a differently constituted tribunal hearing his case at the third hearing. *Held,* that the tribunal's decision must be set aside. Although the claimant consented to a change in the constitution of the tribunal at the second hearing of his case, it did not necessarily imply that he consented to changes in succeeding hearings. Decision R(I) 3/51 compared: Decision No. R(I) 31/57.

A report by local referees, made at the request of the insurance officer and which purported to deal with a question of law, was not seen by the local appeal tribunal when the appeal was considered. *Held,* that the decision of the tribunal was a nullity and that the case should be remitted to another tribunal, differently constituted if possible. Any questions for consideration by referees should be formulated as specific questions of fact: Decision No. R(I) 37/57.

Sarcoma. A miner injured his left shoulder by catching it while at work against a bent steel bar. After seven weeks he became incapable of work. Two months later there was X-ray evidence of a bone lesion in the humerus and within six months there were widespread metastases from a highly malignant sarcoma of bone. Fourteen months after the injury death, due to secondary deposits and toxaemia from a primary sarcoma of the humerus, occurred. *Held,* that death resulted from the injury which he had suffered at work. In the present state of medical knowledge the balance of probability is not in favour of the view that a blow can *cause* a tumour of bone, but in appropriate cases the growth of a tumour or the metastatic spread from a tumour *may be* accelerated by a blow. Each case must be considered on its own facts. The evidence in this case shows that the injury materially accelerated death from a malignant condition which had remained symptomless until the injury occurred: Decision No. R(I) 26/57.

Special hardship allowance. Dairymaid became incapable of work from dermatitis. She lived on a farm in a remote district with her husband and children. *Held,* that if employment which a claimant is capable of following does not exist in his locality but is available elsewhere, then after a reasonable interval such employment would not be unsuitable for the claimant by reason only that it is employment in a different area. The hours of employment in different occupations vary and if an employment is otherwise suitable, the fact that it would involve working longer hours than in a claimant's regular occupation would not render it unsuitable: Decision No. R(I) 24/57.

Claimant suffered an industrial accident on October 12, 1954. On December 17, 1954, a Medical Board found no loss of faculty. On review, an assessment of 3 per cent. (provisional) was made with effect from February 10, 1955, and increased after an operation on June 4, 1956, to 20 per cent. (final) for the period up to December 4, 1956. In July, 1956, the claimant applied for an increase of disablement benefit. *Held,* that an increase of disablement benefit was not payable. The original decision of " no loss of faculty " did not enable the claimant to prove that he had been incapable of following his regular occupation since the end of the injury benefit period: Decision No. R(I) 25/57.

Claimant earned £10 15s. 8d. per week before accident, as a pipe fitter. After the accident he was employed for a period of five months as a cathode ray tube viewer at £10 12s. 0d. per week. He lost this employment through redundancy. Although it was submitted that this employment was exceptional, in that the other jobs which claimant had worked at since the accident were not so well remunerated, it was *held* that the employment as cathode ray tube viewer should be regarded as employment of which he was capable and that special hardship allowance was payable at the rate of 3s. 8d. per week: Decision No. R(I) 27/57.

Claimant sustained an industrial injury to his hand in 1950. He put his name down for an operation in 1950 and told the surgeon his hand was worse in 1954. He did not have the operation till 1956, at a time when he was incapable of work from a further industrial accident. *Held,* that special hardship allowance was not payable. The claimant had not shown that during the four-and-a-half years between the injury and the operation he was making reasonable efforts to secure an operation. Decision R(I) 81/53 quoted: Decision No. R(I) 35/57.

NATIONALISED INDUSTRIES

General

Members. The Lord Privy Seal stated that full-time members of nationalised boards were normally required to give up other appointments. In exceptional circumstances, however, they might, with the approval of the Minister concerned, hold outside directorships. Part-time members might hold outside directorships which, in the opinion of the Minister, would not be likely to prejudice the discharge of their functions as members of the nationalised board. (580 H.C. Deb. 201–202, December 17, 1957.)

The list of members of public boards of a commercial character as at November 1, 1957, with salaries and allowances, together with a list of those holding more than one appointment has been published. It shows, *inter alia,* that the chairmen of the British Transport Commission, the National Coal Board, the Central Electricity Generating Board, the Electricity Council and the Atomic Energy Authority have salaries of £10,000; that the chairman of the Gas Council has a salary of £8,500; that the chairmen of the London Transport Executive, the British European Airways Corporation and the South of Scotland Electricity Board have salaries of £7,500; that the chairman of the British Overseas Airways Corporation (which is a part-time appointment) has a salary of £5,000; and that the chairmen of area electricity and gas boards have salaries of £6,500.

The other boards listed are the Court of Directors of Cable and Wireless, Ltd., the Colonial Development Corporation, the Iron and Steel Holding and Realisation Agency; the Sugar Board, the White Fish Authority, and the Herring Industry Board. (Cmnd. 332; for the previous annual list for Cmnd. 43; and see [1957] P.L. 69, 365.)

Parliamentary examination. The Select Committee of the House of Commons on Nationalised Industries (Reports and Accounts) has issued a Report. The Report deals with (1) the extent to which the finances of nationalised industries are controlled or supervised by Government Departments; (2) the annual Reports and Accounts of the North of Scotland Hydro-Electric Board and the South of Scotland Electricity Board; (3) the annual Report and Accounts of the National Coal Board, the examination of which was not completed by the Committee who make no present comment.

The Committee examined sixteen witnesses on thirteen days. The proceedings of the Committee, Minutes of Evidence and Appendices are published with the Report.

The Committee did not pursue their investigations into the operations of the South of Scotland Electricity Board beyond preliminary stages. The Report stated: "The Accounts show that the Board is in a financially healthy state and your Committee heard nothing in any way critical of the way the Board was carrying out its functions." The year 1956 was the Board's first full year of existence.

The Committee's Conclusion on their investigation of the North of Scotland Hydro-Electric Board was: "In the fourteen years of its existence, the North of Scotland Hydro-Electric Board has impressively justified the faith of its progenitors. It has by now taken its place in the Scottish scene as a firmly established concern. The achievements of the Board in the last few years—in which time it has seen very few changes—themselves rebut the criticism of the Board's present personnel, which was made by one witness, and which your Committee reject. The Board is, however, still subject to a lot of criticism, some of which is unfair, and most of which can readily be answered. Your Committee regret that not one of the Board's annual Reports has been the subject of substantive debate in the House of Commons. They hope that this Report, and the debate which they hope it may provoke in the House, will help the Board." (H.C. 304 of 1956–1957; for terms of reference of the Committee, see [1956] P.L. 270; see also [1957] P.L. 69.)

Airways

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by British European Airways Corporation (H.C. 292 of 1956–1957) and British Overseas Airways Corporation (H.C. 293 of 1956–1957).

Atomic Energy

Committee. The Report has been published of the Committee (Chairman: Sir Alexander Fleck) appointed by the Prime Minister to examine the organisation of certain Parts of the Atomic Energy Authority (Cmnd. 338).

Electricity

Borrowings. Regulations have been made amending the North of Scotland Hydro-Electric Board (Borrowing and Stock) Regulations, 1946, by removing the previous restriction on borrowing for the purpose of repaying instalments of principal on other borrowings (S.I. 1957 No. 1890).

Debate. On November 26, 1957, the House of Commons debated the latest annual reports and accounts of the gas and electricity industries (578 H.C. Deb. 1006–1124).

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the North of Scotland Hydro-Electric Board (H.C.

298 of 1956–1957), the South of Scotland Electricity Board (H.C. 299 of 1956–1957) and the Central Electricity Authority (H.C. 296 of 1956–1957).

Parliamentary privilege. See below, p. 88.

Gas

Debate. See above, under **Electricity.**

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 297 of 1956–1957).

Reports and Accounts of the Area Boards and the Gas Council with the Report of the Minister of Power for 1956–1957 have been published (H.C. 270–286 of 1956–1957).

Transport

Consultative Committees. The Minister of Transport and Civil Aviation gave the names of, the interests represented by and the representative body consulted before appointment of, the members of the South Wales Traffic Users' Consultative Committee. (578 H.C. Deb. 48, November 20, 1957.)

On December 10, 1957, the House of Commons debated on the adjournment the transport consultative committees (579 H.C. Deb. 1229–1238).

Guarantee. The Treasury issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 300 of 1956–1957).

Purchasing procedure. On December 4, 1957, the House of Commons debated on the adjournment the purchasing procedure of the Commission (579 H.C. Deb. 576–584; see also [1957] P.L. 367).

Transport Tribunal. See below, p. 96.

Building Legislation

Report. The committee on building legislation in Scotland (Chairman: Mr. C. W. Graham Guest, Q.C.) has reported (Cmnd. 269).

PARLIAMENT

Constitution

House of Lords. Government proposals for the reform of the constitution of the House of Lords by the creation of life peers and the admission of women to the House through life peerages, were discussed during a debate in the House of Lords on October 30 and 31, 1957, on a motion by a back-bench member, Lord Teynham.

These proposals are the latest of a long series, all of which have been designed to reform the composition of the Upper House in order to bring it more into line with contemporary conditions and needs. The Parliament Act, 1911, which, after a period of frequent conflict between the two Houses, deprived the Lords of the right to reject, or unduly to delay, legislation passed by the Commons as the nation's elected representatives, also envisaged in its preamble an early reform of the second chamber. Since then, continuous efforts—notably in the Bryce conferences of 1918, the Peel resolutions of 1922, the conference of the party leaders in the spring of 1948 on the Parliament Bill, 1947, and the Private Member's Bill introduced in the House of Lords by the late Viscount Simon in February, 1953, which sought to create a limited number life peers—have been made to devise a means of constitutional reform which would improve the efficiency of the House of Lords by broadening the basis of its membership without either depreciating the value of its work or creating rivalry with the House of Commons, but hitherto no solution has been found which could command general agreement.

The 1948 conference of party leaders reached a measure of provisional agreement (recorded in a statement accepted by all parties) (Cmd. 7380) on proposals for the reform of the composition of the House, but these proposals were subject to agreement on the powers to be vested in the reformed House, and on this point the conference broke down. In February, 1953, the Conservative Prime Minister, Sir Winston Churchill, wrote to the leaders of the Labour and Liberal parties proposing a further inter-party conference, but the invitation was declined by the Leader of the Opposition, Lord Attlee, on the grounds that it would serve no useful purpose in view of the " fundamental cleavage of opinion between the Labour and the Conservative parties on what is the proper part to be played by the House of Lords as a second chamber under the constitution." The Government's present proposals, concerned solely with the composition and not with the powers of the House, do not provide for a comprehensive scheme, but were put forward by their spokesman, Lord Home, as steps in the direction of finding a solution, representing " a sensible and practical stage in the evolution of Parliament." Legislation to implement the proposals was foreshadowed in the Queen's Speech.

The House of Lords, at present, consists of over 800 peers, as follows: (*a*) princes of the royal blood (who nowadays take no active part in the proceedings), (*b*) twenty-six spiritual peers (the two archbishops and twenty-four senior bishops of the Church of England), (*c*) all hereditary peers of the United Kingdom (other than minors and those who have not applied for a writ of summons), (*d*) sixteen representative peers of Scotland elected from their own number by the Scottish hereditary peers for each Parliament in accordance with the provisions of the Treaty of Union, 1707, (*e*) three representative peers of Ireland, elected for life, and (*f*) nine Lords of Appeal in Ordinary, appointed to perform the judicial duties of the House and holding their seats therein for life.

Temporal peerages are conferred as a mark of distinction by the Sovereign on the advice of the Prime Minister, who may be advised by his ministerial colleagues and others. All, except the judicial peerages, are hereditary, and with the exception of the Scottish and Irish peerages, they carry with them, for men of over twenty-one years, a right to a seat in the House of Lords. A summons to Parliament cannot be withheld from a peer who is entitled to it, but only about a quarter of the members take an active part in the work of the House, although many more may attend on occasion, when some matter in which they have a special interest is being discussed, or when they can claim, from their very considerable experience, to speak with authority on the subject under review. Many peers who are in constant attendance at the House are elder statesmen and others who have spent their lives in public service; party politics have little effect upon membership, which remains relatively stable over long periods of time.

One of the most frequently criticised features of the House of Lords as at present constituted is the potential right of its " backwoodsmen " (*i.e.*, peers who seldom attend the House) to appear at Westminster on critical occasions and exercise their vote; and during the debate on the late Viscount Simon's Bill in 1953, many schemes were proposed to reduce the number of hereditary peers with the right to attend the House of Lords, but none of the proposals proved generally acceptable. The position of absentee members has since been further examined by a " Select Committee on the Powers of the House in Relation to the Attendance of its Members," set up by the Government in 1955. In its report, issued in January, 1956, the committee suggested that Standing Orders might be promulgated to the effect that, at the beginning of every Parliament, members should be asked whether they desire to be relieved from the obligation of attendance, and that, if so, they should apply for leave of absence, either for the duration of the Parliament or for any shorter period, during which time they would be expected not to attend the House. This procedure would be likely to establish a " known working body of peers "; and it was suggested during the debate of October 30 that the House should introduce Standing Orders on the lines of the report as soon as possible. (H.L. (7) (66–I) (67); see [1956] P.L. 165–166 and below, p. 89.)

The Secretary of State for Commonwealth Relations, Lord Home, said on October 30, 1957, that the House of Lords, which in 1911 had seemed condemned to early extinction, had in fact survived two world wars and a social revolution, and was still an essential and, he believed, respected part of the British constitution, one of the most valued features of which had been continuity in the structure and conduct of the country's political institutions. The process had been one of adaptation rather than revolution, reflecting the outlook and character of the British people. Although in theory it was perhaps difficult to justify a parliamentary system which included the hereditary principle, " nevertheless it works; and by and large, that is the test which the British public applies." The great majority of people in Britain were, he believed, convinced that in the complex society of today, there must be a second chamber. No one wished to have an elected rival to the House of Commons, but there was daily proof that the hard-pressed House of Commons could not do without a complementary chamber responsible for revising legislation. Nor, he believed, would it be wise to do away with a second chamber which allowed time for second thoughts on matters of national controversy, which could often be seen in better perspective after " the cooling process " of the Lord's debates. The Government did not propose at the present time to raise the issues, either of any alteration in the powers of the Lords or of the abolition or reduction of the right of hereditary peers to legislate. It did not seem to them that there was at present sufficient agreement, either between the main political parties or even within those parties, for these questions to be pursued with profit. There were, however, certain measures which could bring the House abreast of the needs of today and add to its efficiency, and which, he believed, would command a wide measure of agreement. " The first is the reinforcement of the House by life peers. The second is the inclusion of life peerages for women. The third, with which we began in the summer of this year, is the payment of expenses so as to make it possible for a peer to pursue his parliamentary duties without financial hardship to himself."

The creation of life peers as a means of reinforcing the second chamber has been suggested from time to time since 1856. In proposing this anew on behalf of the Government, Lord Home pointed out that it seemed to recognise the undoubted fact that there were persons of distinction and eminence who could bring added influence and authority to the discussions of the House, but who did not feel able, in the changed social conditions of today, to accept an hereditary peerage. The creation of life peers, who would be selected with the same scrupulous care as peers of the first creation were now selected, would do much to overcome this difficulty. The presence in the House of a greater number of persons of distinction in the public service, of those who could represent some aspect of the nation's life with a peculiar authority, and of those who could assist the Government or the Opposition in the conduct of parliamentary business, would enhance its ancient status, traditions and prestige. No limit to the number of life peers who might be created has been suggested since, according to Lord Home, " it might be that we should want more life peers in the early years and considerably fewer in the later years of this experiment, and there would seem a great deal to be said for flexibility." A suggestion by the Lord Bishop of Chichester that leaders of churches other than the Church of England (which contributes the twenty-six spiritual peers of the House) should be admitted as life peers, was welcomed by the Lord Chancellor who stated that it would be possible for the Prime Minister to consider recommendations for life peerages for eminent members of the Church of Scotland, and that the inclusion of leaders of other churches (*e.g.*, the Roman Catholic Church and the Free Churches) would receive further consideration.

The Sex Disqualification (Removal) Act, 1919, provides that "a person shall not be disqualified by sex or marriage from the exercise of any public function"; but this enactment has not so far applied to the admission of women to the House of Lords, peeresses in their own right being excluded. The admission of women was now advocated by Lord Home as being "a recognition of the place which woman have commanded for themselves as of right in modern society."

Peers receive no salary for their work in the House of Lords, but since 1946 they have been entitled, if they attend regularly, to travelling expenses from their homes to the Palace of Westminster. Since July, 1957, all members of the House of Lords (except the Lord Chancellor, the Lord Chairman of Committees, and any member in receipt of a salary as holder of a ministerial office) have also been entitled to claim payment for expenses incurred for the purpose of attendance at sittings of the House, or Committees of the House other than sitting for judicial business, within a maximum of three guineas a day. Some speakers during the debate suggested that further measures might be necessary in order that no person of distinction should be prevented from accepting a life peerage on financial grounds.

The case for attempting to limit the number of hereditary peers in the House by legislation had been argued many times, said Lord Home, but he wondered whether such action was either urgent or wise. In theory, some 900 peers could attend the House at once. In practice, nothing like that ever happened. A peer used Parliament when he had some first-hand knowledge to contribute to debates; and the House profited exceedingly from the contributions of "backwoodsmen" who came from the country and knew intimately the conditions of country people; and also from those people, some of them Commonwealth citizens, who lived in the colonies or other Commonwealth countries, and visited the House from time to time. A further consideration was the need for young men, who at present served their political apprenticeship in the House and who could be called upon to assist in all the stages of the piloting of Bills through the House; how could there be found, by any scheme of limitation involving election or selection, these recruits whose political form could not yet be assessed? The House could itself, if it wished, deal with non-attending peers by Standing Orders, as had been suggested. (205 H.L. Deb. 581–678, 683–774, October 30 and 31, 1957.)

A preliminary indication of the Labour Party's attitude to the proposals was given by the Leader of the Opposition, Mr. Gaitskell, during the Commons debate on the Address in reply to the Queen's Speech. Mr. Gaitskell said that the Labour Party were wholly opposed to the idea of heredity as a qualification for membership of a second chamber. They were also against discrimination between the sexes in the right to sit in political assemblies. In isolation, therefore, the proposals might well be regarded as an improvement. But the Labour Party were not sure that they could be treated in isolation from the present character of the House of Lords and the powers it still retained. They were against any idea that to make the House of Lords "more respectable" by introducing life peerages would justify any increase in its powers. Many of them felt that even the delaying power which remained was not justified. In any event, this minor change would do "no more that tinker" with the problem of the reform of the Second Chamber. In the Party's view, if a Second Chamber was to continue, three conditions should be observed: it should not be an independently elected body elected according to some other system than that of the House of Commons; its membership should not be based at all on the hereditary principle; and it must not be able to overrule the elected House of Commons. (577 H.C. Deb. 18–20, November 5, 1957.)

(The above summary is based on Commonwealth Survey, C.O.I., November 12, 1957.)

On December 3 and 5, 1957, the House of Lords gave a Second Reading, without dividing, to the Life Peerages Bill. This Bill gives power to Her Majesty to confer on any person, including a woman, a peerage for life with the right to sit and vote in the House of Lords (206 H.L. Deb. 609–726, 843–951). On December 17 and 18, 1957, the Bill passed through the Committee stage and was reported without amendment (206 H.L. Deb. 1205–1279, 1284–1311).

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates issued its Sixth Report (on Running Costs of Hospitals) (H.C. 222 of 1956–1957), its Eighth Report (on War Histories) (H.C. 306 of 1956–1957), its Fifth Special Report (being observations of Government Departments on its Seventh Report of 1955–1956, and on its Second, Third and Fourth Reports of 1956–1957) (H.C. 307 of 1956–1957), and its First Special Report (on Appointment of Sub-Committees and Reference of Estimates to Sub-Committees) (H.C. 19 of 1957–1958).

Law Officers and the House of Lords

The Lord Chancellor in reply to a Question on November 19, 1957, gave an explanation of the historical relationship between the Law Officers and the House of Lords. The Question and Answer are set out above (p. 4) (206 H.L. Deb. 377–382).

Mace

Article. The Mace in the House of Commons is the subject of an article by the Deputy Serjeant at Arms published by H.M.S.O. (House of Commons Library Document No. 3.)

Members

House of Commons Fund. A Resolution of the House of Commons dated July 18, 1957, provides that the amount of the sums to be deducted or set aside from the salaries of Members under section 1 (3) of the House of Commons Members' Fund Act, 1939, shall be increased from twelve pounds to eighteen. (S.I. 1957 No. 1919.)

Nationalised Industries

See NATIONALISED INDUSTRIES, **General** (above, p. 83).

Offices (House of Lords)

Select Committee. The First Report from the Select Committee on the House of Lords Offices has been published. It concerns appointment of sub-committees, papers not available for distribution, Record Office and other matters (H.L. (15) of 1957–1958).

Privilege

London Electricity Board. On April 8, 1957, Mr. G. R. Strauss, M.P., drew the attention of the House to communications between himself and the Paymaster General, the London Electricity Board, and the solicitors for that Board. Mr. Strauss stated that the Board, by letter to him of March 8, 1957, and by letters from the solicitors to the Board dated March 27, 1957, and April 4, 1957, threatened to institute against him proceedings for libel in respect of statements made by him in a letter written by him on February 8, 1957. Mr. Strauss complained that those threats were a breach of privilege of Parliament. Mr. Speaker ruled that the threats constituted a prima facie case of breach of privilege and the House resolved to refer the matter to the Committee of Privileges. (568 H.C. Deb. 819–822, April 8, 1957.)

The Committee of Privileges reported on October 30, 1957. Their conclusion was: (a) In writing the letter of February 8, 1957, to the Paymaster

General of which the London Electricity Board complained, Mr. Strauss was engaged in a " proceeding in Parliament " within the meaning of the Bill of Rights; (b) the London Electricity Board in threatening by the letters from themselves and their solicitors to commence proceedings for libel against Mr. Strauss for statements made by him in the course of a proceeding in Parliament were threatening to impeach or question the freedom of Mr. Strauss in a court or place outside Parliament, and accordingly the London Electricity Board and their solicitors had acted in breach of the Privilege of Parliament; (c) the opinion of the Judicial Committee of the Privy Council should be sought on the question whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its Privilege. (H.C. 305 of 1956–1957.)

Article 9 of the Bill of Rights declared and enacted that " The freedom of speech and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament."

Section 1 of the Parliamentary Privilege Act, 1770, provided: " Any person or persons shall and may at any time commence or prosecute any action or suit in any court of record or court of equity or of admiralty, and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of Parliament of Great Britain, or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the House of Commons of Great Britain for the time being, or against their or any of their menial or any other servants, or any other person entitled to the privilege of Parliament of Great Britain; and no such action, suit, or any other process or proceeding thereupon shall at any time be impeached, stayed, or delayed by or under colour or pretence of any privilege of Parliament."

On December 4, 1957, the House of Commons resolved by a majority, to seek the advice of the Judicial Committee of the Privy Council as recommended by the Committee of Privileges " in order that this House may take such action as seems to it proper in the circumstances " (579 H.C. Deb. 393–490).

Procedure

Leave of absence (*House of Lords*). The House of Lords approved a motion to resolve: That this House would welcome the adoption of the conclusions relating to the delivery of Writs of Summons contained in paragraph 15, and the conclusions relating to Leave of Absence contained in paragraphs 29 to 39, of the Report of the Select Committee on the Powers of the House in relation to the Attendance of its Members; and that a Select Committee be appointed to frame and propose to the House Standing Orders for giving effect to the conclusions relating to Leave of Absence (206 H.L. Deb. 977–1020, December 10, 1957; for the Report of the Select Committee, see [1956] P.L. 165; and see above, p. 85).

Private Member's Bill. On December 11, 1957, Mr. John Hall moved that leave be given to bring in a Bill to amend section 38 of the National Health Service Act, 1946, and for purposes connected therewith. The Bill would involve public expenditure. Standing Orders provide that if a Bill places a charge upon public funds it cannot be brought in until there has been a Resolution of a Committee of the whole House sanctioning the expenditure. Mr. Hall's Bill, by one of its clauses, imposed a charge on the National Land Fund to meet the expenditure. After debate on points of order, Mr. Speaker asked for time to consider the matter further (579 H.C. Deb. 1277–1289). On December 17, 1957, Mr. Speaker ruled that Mr. Hall was in order (580 H.C. Deb. 207–212, 217–218).

Private Notice Questions (*Leader of the Opposition*). On December 10, 1957, the acting Leader of the Opposition sought to ask a Question by

Private Notice. Mr. Speaker refused to allow it because a similar Question had been previously answered. On December 18, Mr. Speaker stated that it was the custom for the Leader of the Opposition not to ask any Questions but to ask those which were of an urgent important character and that he never put a Question on the Order Paper but put it by Private Notice. Such Questions by Private Notice were bound by the same rules as ordinary Questions; but a less strict view was, by custom, taken of Private Notice Questions from the Leader of the Opposition in that urgency was not insisted on; the factor of importance was left to the Leader of the Opposition himself to decide (579 H.C. Deb. 1080–1087; 580 H.C. Deb. 428–437).

Select Committee. On December 4, 1957, the House of Commons debated the First and Second Reports from the Select Committee on Procedure, 1956–1957 (579 H.C. Deb. 491–574). On December 18, 1957, Standing Orders 57, 59, 60 and 61 were amended and a new Standing Order 61a was made (580 H.C. Deb. 513–568). The Standing Orders relate to Standing Committees and Scottish Committees (see [1957] P.L. 271, 368).

Prorogation and Opening

On November 1, 1957, Parliament was prorogued to November 5, 1957, and the Second Session of the Forty-first Parliament of the United Kingdom ended (for Queen's Speech, see 575 H.C. Deb. 531–536; 205 H.L. Deb. 779–784).

On November 5, 1957, the Third Session opened (for Queen's Speech, see 577 H.C. Deb. 4–7; 206 H.L. Deb. 1–5).

Statutes

Royal Assent. The National Insurance (No. 2) Act, 1957 (6 Eliz. 2, c. 1), received the Royal Assent on November 28, 1957 (see above, p. 77).

The Expiring Laws Continuance Act, 1957 (6 Eliz. 2, c. 2), and the Public Works Loans Act, 1957 (6 Eliz. 2, c. 4), received the Royal Assent on December 19, 1957.

See also SUBORDINATE LEGISLATION (below, p. 92).

PUBLIC AUTHORITIES

Agricultural Land Commission

Report. The Tenth Annual Report, for 1956–1957, has been published (H.C. 289 of 1956–1957).

Bacon and Pigs Boards

Dissolution. An Order has been made dissolving on December 4, 1957, the Bacon Development Board, the Pigs Marketing Board and the Bacon Marketing Board (S.I. 1957 No. 2078).

Board of Control

Report. The Annual Report, for 1956, has been published (H.C. 242 of 1956–1957).

Central Midwives Board

Scotland. Rules have been made and approved for the Central Midwives Board for Scotland. The rules approved consolidate and amend the Central Midwives Board for Scotland Rules, 1947, 1951 and 1955. The Central Midwives Board for Scotland (Election Scheme) Rules, 1952, are not affected. The principal changes made by the new rules are:—

(*a*) additions are made to the prescribed courses of instruction in the administration of analgesia;

(*b*) the use of the designation "maternity nurse" to denote a midwife acting under the direction of a doctor is terminated;

(*c*) a local supervising authority may no longer prosecute charges before the Board when the removal of a midwife's name from the Roll is being considered;

(*d*) notice need no longer be given that a midwife is to be represented or assisted by a friend at the hearing by the Board of a complaint about her conduct;

(*e*) a midwife wishing to enter for the examination for the Midwife Teacher's Diploma need not now be twenty-five years of age. (S.I. 1957 No. 2011.)

Clean Air Council

Scotland. An Order has been made providing for the constitution and procedure of the Council for Scotland (S.I. 1957 No. 1994). The Secretary of State for Scotland gave the names of its members (578 H.C. Deb. *71–72,* November 21, 1957).

Iron and Steel Board

Salaries. The Minister of Power stated that the chairman would receive a salary of £8,500, the deputy chairman £7,500, full-time member £7,000, and part-time member £1,000 (H.C. 34 of 1957–1958).

National Assistance Board

Determination of need. The Board has issued an explanatory memorandum on the National Assistance (Determination of Need) Amendment Regulations, 1957 (S.I. 1957 No. 2072). The House of Commons debated the instrument on November 27, 1957 (578 H.C. Deb. 1188–1256).

REMEDIES

Certiorari

Shop premises consisting of two rooms on the ground floor and four living-rooms on the upper floor were let to a tenant who referred the letting to a rent tribunal. The rent book was headed "Business premises, shop, warehouse and yard." The landlord contended that the premises had been let for business purposes only and that the tribunal had no jurisdiction, but the tribunal found that there were facts which entitled them to proceed with the hearing and they reduced the rent. On an application by the landlord for an order of certiorari, *held* that certiorari would not issue where there were disputed questions of fact: R. *v.* SHEFFIELD AREA RENT TRIBUNAL, *ex p.* PURSHOUSE (1957) 121 J.P. 553, D.C.

Applicants moved for an order of certiorari to quash an order of the Patents Appeal Tribunal that no reference to the applicants' patent need be inserted in the respondents' specification. The Divisional Court *held* that no manifest error of law appeared on the face of the Patents Appeal Tribunal's decision and dismissed the motion: *Re* BALDWIN & FRANCIS' APPLICATION [1957] R.P.C. 465.

Habeas Corpus

Attaching a form of indorsement on to a warrant of arrest with a pin is not making "an indorsement on the warrant" within section 12 of the Indictable Offences Act, 1848, as amended by the Magistrates' Courts Act, 1952, Sched. 5.

An Irish court issued a warrant for the arrest of the applicant for an offence under section 12 of the Children Act, 1908. Subsequently, a metropolitan magistrate, purporting to indorse the warrant under section 12 of the Act of 1848, signed a form authorising the execution of the warrant and pinned the form on to the warrant. On an application for a writ of habeas corpus, *held*, that the warrant had not been indorsed in the manner required by the Act of 1848 and the application should be allowed: R. *v.* METROPOLITAN POLICE COMMISSIONER, *ex p.* MELIA [1957] 1 W.L.R. 1065; [1957] 3 All E.R. 440, D.C.

SCOTLAND

See COURTS (above, p. 70), NATIONAL HEALTH SERVICE (above, p. 76), PARLIAMENT, **Procedure,** *Select Committee* (above, p. 90), PUBLIC AUTHORITIES (above, p. 90), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 93).

SUBORDINATE LEGISLATION

Emergency Laws

Continuance in force. On November 14, 1957, the House of Commons approved resolutions continuing in force certain emergency legislation as explained in a White Paper (Cmnd. 297) (577 H.C. Deb. 1173–1195). (See also S.I. 1957 Nos. 2056, 2057, 2058, 2062.)

Parliamentary proceedings

Select Committee on Statutory Instruments (House of Commons). The Sessional Order establishing the Committee was made on November 6, 1957 (577 H.C. Deb. 300–302).

On November 12 and 26, and December 10, 1957, the Committee considered 111, 23 and 24 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for memorandum from Government Departments in respect of four instruments. In the Report of November 26, 1957, the Committee to draw the special attention of the House to the British Transport Commission (Male Wages Grades Pensions) (Amendment) Regulations, 1957 (S.I. 1957 No. 1455) on the ground that they appeared to make unexpected use of the powers conferred by the Statute under which they were made. (H.C. 11, 11–II, 11–III of 1957–1958.)

Special Orders' Committee (House of Lords). The Sessional Order establishing the Committee was made on November 7, 1957 (206 H.L. Deb. 125).

In the First, Second and Third Reports, the Committee examined fourteen instruments. The Committee found that the provisions of four of them raised important questions of policy and principle, that two were not founded on precedent, and that all could be approved without further special inquiry. In their First Report, the Committee drew attention to the anomaly of renewing emergency powers year after year. In their Third Report they expressed doubt whether paragraph 12 of draft Council of Europe (Immunities and Privileges) Order in Council, 1957, was *intra vires* (H.L. (2) (11) (17) of 1957–1958).

TOWN AND COUNTRY PLANNING

Ancient and Historical Monuments

Selkirkshire. The Fifteenth Report of the Royal Commission (Chairman: Earl of Wemyss) has been published (Cmnd. 276).

Enforcement notice

An owner of land whose rights are to be affected by the service of an enforcement notice is entitled to a proper notice setting out the real grounds of the complaint or claim against him, whatever it may be. *Perrins* v. *Perrins, infra,* was wrongly decided and a person aggrieved by the service of an enforcement notice can litigate before the High Court even though he has not appealed against the notice under section 23 (4) of the Town and Country Planning Act, 1947, to a court of summary jurisdiction.

The owner of land placed some caravans on the land and applied to the local planning authority for permission to use the land for that purpose. The authority refused permission, but on appeal the Minister permitted the owner to use the land as a caravan site for six months. Two years later, the owner having continued to use the land for caravans, the local authority served an enforcement notice stating that whereas the land was developed by placing thereon caravans for residential purposes and such development was carried out without the grant of planning permission, the local planning authority, in exercise of its powers, gave notice to remove the caravans within fifty-five days. The owner did not appeal against the notice to a court of summary jurisdiction under section 23 (4), but applied to the High Court for a declaration that the notice was invalid because it did not specify the development alleged and because planning permission had been granted. *Held,* (1) that the notice adequately set out the grounds of complaint and identified the act which it was alleged constituted the breach; but (2) in stating that the development was without permission the notice ignored the permission, albeit not prior permission, given by the Minister, and therefore the notice was invalid; the fact that the owner did not appeal to a court of summary jurisdiction did not debar him from applying to the court for relief by virtue of section 24 (1); accordingly, the owner was entitled to a declaration: FRANCIS *v.* YIEWSLEY AND WEST DRAYTON U. D. C. [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529, C.A. (affirming decision of McNair J. [1957] 2 Q.B. 136, applying *East Riding County Council* v. *Park Estates* (*Bridlington*) [1957] A.C. 223; overruling *Perrins* v. *Perrins* [1951] 2 K.B. 414.

See also COMPULSORY PURCHASE (above, p. 70).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Committee. On October 31, 1957, the House of Commons debated the Report of the Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks).

The committee recommended the setting up of two councils on tribunals to exercise general supervision; the Government proposes a single council, to be appointed jointly by the Lord Chancellor and the Secretary of State for Scotland; any matters which are peculiar to Scotland can be dealt with by a special committee or panel of the council. The council will also be consulted before any new tribunal is set up. Its functions will be advisory, not executive.

The Government proposes to remove restrictions on the right of legal representation before tribunals, with the proviso that further consideration will be given in the case of the numerous local service committees under the National Health Service.

In general, adjudicating chairmen will be appointed by the Lord Chancellor (in England and Wales) and the Lord President of the Court of Session (in Scotland) instead of by the Minister concerned, as at present, but the members of the tribunals will be appointed by departmental Ministers, after consultation with the council on tribunals: this will preserve accountability to Parliament. Generally, chairmen of tribunals will have legal qualifications, but exceptions may be made.

The Government is not prepared to make legal aid available until progress under the Legal Aid and Advice Act, 1949, has been made in other directions; it has not yet been possible to extend the scheme to all litigation before the ordinary courts.

Further consideration will be given to the Franks Committee's recommendations on appeals from tribunals. The Government sought the views of Members of Parliament on the proposal to entrust the adjudicating functions now exercised by county agricultural executive committees to the Land Tribunal or the Scottish Land Court; in principle, the Government is in favour of this change, but discussions are going on with agricultural organisations about disciplinary powers and other matters under the Agriculture Act.

On the questions of compulsory acquisition of land and town planning, the Government is in sympathy with the committee's aim " to give to the citizen a greater sense of a fair hearing and to bring the process by which the final decision is reached as far as possible into the open." Some of the recommendations can be implemented without further legislation, and the Government will make the necessary arrangements where possible; others will require amendments to the law and these will be considered after the setting up of the council on tribunals.

The Government accepts in principle that, before an inquiry, the appellant shall know the full case of the authorities, and have any help he needs. The independence of the inspectors (employed by the Minister of Housing and Local Government) will be emphasised by their appointment and dismissal only after consultation with the Lord Chancellor. The existing practice of the Education Department will continue: *i.e.,* the appointment of persons outside the public service to conduct inquiries. Inspectors' reports will be published.

The Government accepts generally the recommendations on the procedure to be followed at inquiries; but will give further consideration to the question of the award of costs to successful objectors or appellants. It does not feel able to accept the recommendation that Service Departments proposing to acquire land compulsorily should adopt the same procedure as other Departments, such as the Ministry of Agriculture, in peace-time, unless special security cases arise, but proposes that private hearings of objections be conducted by a person appointed by the Lord Chancellor or the Secretary for Scotland.

Summing up, the Attorney-General said that of the ninety-five recommendations of the committee, seventy-one had been completely or broadly accepted by the Government, eight accepted in some degree, four not accepted, and twelve reserved for further consideration. Where they were not accepted, the Government would " try to find some alternative method which complies with the spirit of the Franks Report." (575 H.C. Deb. 400–519.)

The above summary is based on Commonwealth Survey, C.O.I., November 26, 1957.

On November 12, 1957, the Secretary of State for the Home Department said that the Government did not feel able to accept recommendations (16), (56), (68) and (94) of the Report and that recommendations (20), (36), (37), (38), (39), (60), (76), (77), (82), (90) and (95) were reserved in whole or in part for further consideration. (577 H.C. Deb. *41*.) Recommendation (16) relates to legal aid; (56) is that the National Health Service Tribunal should in general sit in public; (68) is that Ministers should make policy statements before inquiries; (94) is that some decisions should be delegated to inspectors.

On November 27, 1957, the House of Lords debated the Report. On recommendation (68) the Lord Chancellor said: " The difficulty of issuing a statement of policy in relation to a particular fact is that the objector will then think that his case is prejudged and will come to the inquiry without much hope. The way I prefer to deal with it is for the Minister to make available a collection of his policy decisions in general matters. May I take, for example, the question of a petrol station? He may say that the limits have been reached in regard to roads where new petrol stations might be erected, or something like that. But to try to say 'This is my policy in respect of a specific application,' is, I think very difficult and might do exactly the opposite of what we want to do."

The Lord Chancellor said, dealing with those recommendations requiring administrative action: " These are the ones we hope to get on with at once: recommendation (67), which deals with making available particulars of the case before the inquiry; recommendation (71), where the Ministry or other authority is to explain proposals fully at the inquiry and support them by oral evidence; recommendation (75), which requires officials of the Department to give evidence at the inquiry in certain circumstances; recommendations (80) and (82), providing for the publication of inspectors' reports; recommendation (84), requiring Minister's letter of decision to set out full finding on inferences of fact and reasons for decision; and recommendation (92), requiring local planning authorities to discuss applications with the applicants. All these, I think, can be put into full operation. I am glad to say that some of them are already the practice, though they may not be quite acceptable in the form of the recommendation by the Franks Committee." (206 H.L. Deb. 522–592.)

Conscientious objectors' tribunals

Report of the Committee on Administrative Tribunals and Enquiries. The Minister of Labour and National Service stated that he would direct special attention to the proposal of the Committee that appellate tribunals should distribute decisions in test cases (578 H.C. Deb. 1152–1153, November 27, 1957).

Disciplinary bodies

Law Society. An unadmitted solicitor's clerk was in 1953 convicted of larceny of property belonging neither to his employer nor his employer's clients. In September, 1957, the Law Society, acting under section 16 (1) of the Solicitors Act, 1941, as amended by section 11 (1) of the Solicitors Act, 1956, directed that no solicitor should employ the clerk in connection with his practice without the written permission of the Law Society. *Held,* dismissing an appeal by the clerk, that the Law Society had jurisdiction to make the order even though their jurisdiction was provided by the amending Act of 1956 and did not exist at the date of the conviction. The Act of 1956 enabled an order to be made disqualifying a person from acting as a solicitor's clerk in the future, and what happened in the past was the cause or reason for the making of the order, but the order had no retrospective effect: *Re* A SOLICITOR'S CLERK [1957] 1 W.L.R. 1219; [1957] 3 All E.R. 617, D.C.

National Health Service Tribunal. A Report by the Chairman (Sir Reginald Sharpe) on the work of the Tribunal for England and Wales during the three years ended July 4, 1957, shows that in six cases out of fifteen the Tribunal directed that the practitioner's name be removed from the Executive Council's list. This is the third three-year Report.

Lands Tribunal

In May, 1954, the Lands Tribunal adjourned for two months an appeal from the Central Land Board's determination of the development value of land and ordered expert witnesses' documents to be lodged with the Lands Tribunal and served on the other side by June 21, 1954. Before the adjourned hearing the district valuer, a witness for the respondents, was told evidence would be led by the appellants, but no documents were produced to him. At the hearing of the appeal it was sought to tender additional witnesses on behalf of the appellant. The Board objected to the additional evidence on the ground that it related to transactions of which no notice had been given to the respondents by June 21. The Tribunal upheld the objection. Held, that the matter fell within rule 31 of the Lands Tribunal Rules, 1949, and it was not correct in law to exclude the evidence tendered: TRUSTEES OF THE ESTATE OF ROUTH *v.* CENTRAL LAND BOARD (1957) 8 P. & C.R. 290, C.A.

Medical Practices Committee

Committee on Administrative Tribunals and Enquiries. The Minister of Health stated that he had implemented the recommendation of the

Committee (on tribunals) that he should give reasons for his decisions in cases of appeal from the Medical Practices Committee in respect of selections made for general practice vacancies (579 H.C. Deb. 898–899, December 9, 1957).

Pensions Appeal Tribunals

Allowances. Rules have been made for England and Wales (S.I. 1957 No. 1827) and for Scotland (S.I. 1957 No. 1972) increasing allowances payable to appellants and their attendants for loss of time and for subsistence.

Transport Tribunal

Proceedings have been published in the matter of the application of the British Transport Commission (1957 No. 9) for the alteration of the B. T. C. (Railway Merchandise) Charges Scheme, 1957 (88–810–1).

Traffic cases. Reports (Vol. 31, Part 2) of cases decided have been published (55–313–31–2).

See also REMEDIES (above, p. 91).

WALES

Government administration

The Report on Development and Government Action in Wales and Monmouthshire for the year ended June 30, 1957 (Cmnd. 319), and a White Paper on Government Administration in Wales (Cmnd. 334) have been published.

The Government proposed the appointment of a Minister of State for Welsh Affairs to assist the Minister for Welsh Affairs. One or other of these Ministers would take the chair at the regular meetings of the Conference of Heads of Government Departments in Wales and a Committee of that Conference would be set up to ensure co-ordination of the study of economic developments, needs and prospects in all parts of Wales, and to initiate fresh lines of study as they were required.

The House of Commons debated these proposals on December 16, 1957 (580 H.C. Deb. 32–153; see also 579 H.C. Deb. 1430–1433, December 12, 1957).

WIRELESS AND TELEVISION

British Broadcasting Corporation

Report. The Annual Report and Accounts, for 1956–1957, have been published (Cmnd. 267).

Independent Television Authority

Report. The Annual Report and Accounts, for 1956–1957, have been published (H.C. 1 of 1957–1958).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial research. Reports have been published for 1956–1957 of the Colonial Research Council and many specialist advisory bodies and others (Cmnd. 321).

Aden

Constitutional proposals. Proposals for constitutional advance in Aden Colony, including the introduction of an elected majority in the legislature and of a membership system (under which local people will be in charge of certain departments of government), were published in an extraordinary issue of the *Aden Colony Gazette* on November 11, 1957. The proposals have been put forward by the Governor after discussions with the Executive Council and unofficial members of the Legislative Council. Steps will be taken to implement them when an opportunity has been given to assess local reactions. If the proposals are approved, the new Legislative Council will assemble early in 1959. An outline of the proposals is given below.

The Legislative Council will consist of twelve elected members (representing single-member constituencies), six nominated and five *ex officio* members, The Governor will no longer preside, but will appoint a Speaker, who will have no vote. The present qualified franchise will remain unchanged. The life of the new legislature will be four years instead of three as at present.

Five unofficial members of the Legislative Council, including not less than three of the elected members, will be appointed Members-in-Charge of Departments. It is contemplated that, initially, they will be in charge of education, works, communications, labour and social welfare, and medical services. These Members-in-Charge will be responsible for the general administration of the departments they control and for formulating departmental policy. They will be responsible in the Legislative Council for replying to questions and sponsoring legislation on departmental matters.

Membership of the Executive Council will be increased to consist of the five *ex officio* members of the Legislative Council and the five Members-in-Charge of Departments, with the Governor as President. The Governor will have reserve executive and legislative powers.

English and Arabic will be the official languages in the Legislative Council, with English prevailing in the case of a dispute in interpretation.

A warning is given that implementation of the proposals will involve increased expenditure of public funds.

The Legislative Council at present consists of four *ex officio* members, five nominated official members, five nominated unofficial members and four elected members (three representing constituencies and one representing the Aden Municipal Council). The Governor presides and has an original and a casting vote. The Council was reconstituted in this way in December, 1955, and the first elections to be held in Aden took place in that month.

The Executive Council consists of the Governor as President, three *ex officio* members and four other members appointed by the Governor. There is, at present, no ministerial or membership system in Aden, but an informal arrangement was introduced in July, 1956, whereby each unofficial member of the Legislative Council is particularly associated with the work of one or two departments of government.

The above summary is based on Commonwealth Survey, C.O.I., November 26, 1957. (See also 578 H.C. Deb. 992–993, November 26, 1957.)

British Guiana

Report. The Colonial Report, 1956, has been published by the Colonial Office.

British Honduras

Delegation. The Secretary of State for the Colonies on November 27, 1957, made the following statement about a delegation which had come to London to discuss the Colony's financial needs and the question of future constitutional advance. The Secretary of State said:

"The delegation . . . had begun official discussions. Early in their visit the four unofficial delegates were invited to a luncheon by the Guatemalan Minister in London. A plan was then put forward which involved severing the connection of British Honduras with the British Crown and associating it in some form with the Guatemalan Republic. When, ten days later, I asked the delegation about this lunch, it emerged that Mr. Price (leader of the majority party in the legislature) was still considering this most improper offer and had not, so he told me, even then made up his mind.

In the course of my meetings with the delegation it also came out that in addition to this incident Mr. Price had been engaged in discussions on his own with the Guatemalan Minister in London. These private discussions he attempted to conceal not only from the Governor and myself, but also from at least two of his three unofficial colleagues. With such a lack of good faith on Mr. Price's part, I have felt it impossible to continue negotiations with him. Though I would gladly have continued discussions with the rest of the delegation, I felt, and the Governor agreed, that the right thing was for the whole delegation to return to British Honduras and deal with the consequences of this breakdown in the negotiations.

I look forward to a resumption of the talks with a reconstituted delegation as soon as possible in an atmosphere of mutual trust in which the attitude of Her Majesty's Government will be unaffected by this unhappy episode."

In answer to a supplementary question about the future financial position of British Honduras, Mr. Lennox-Boyd said that he would be agreeing a provisional measure of financial aid to enable the administration of the Colony to continue for what he hoped would be a short interval before a delegation could return to continue talks with him.

In a further statement on December 3, 1957, Mr. Lennox-Boyd said: "The actions of Mr. George Price which caused the breakdown of the discussions with the British Honduras delegation were taken on his own responsibility, and not in furtherance of the programme of the People's United Party. Neither the Governor nor I has any quarrel with that party which, although strongly opposed to British Honduras entering the West Indian Federation looks to developing self-government and in due course to British Honduras controlling its own destiny. While anxious to foster economic contacts with Central American States it has never advocated any form of joint association in government with Guatemala, still less subordination to that country. Her Majesty's Government regard the Guatemalan claim to sovereignty over British Honduras as completely without foundation, but, as Mr. Price was informed some months ago, we have told the Guatemalan Government that we are very ready to discuss with them and the British Honduras Government any other questions concerning their relations with British Honduras. . . . Our aim is, in British Honduras as elsewhere, to build up as rapidly as possible economic and social foundations on which political development can proceed as far and as fast as its circumstances permit.

As regards British Honduras joining the West Indies Federation, it is for the people themselves, through their representatives in their legislature, to decide this. Her Majesty's Government have given many assurances, which I now repeat, that we have no intention of dictating to them on the matter."

Mr. Price has, since his return to British Honduras, been suspended from the Colony's Executive Council and removed from his post as Member for Natural Resources. Arrangements are being made for another elected member to take his place on the Council. (578 H.C. Deb. 1169–1172; 579 H.C. Deb. 194–196.)

Brunei

Constitutional proposals. Draft legislation for a new constitution for the State of Brunei, with an accompanying statement, was published in Brunei on September 25, 1957, on behalf of His Highness the Sultan. A further statement was made by the British Resident, Mr. J. O. Gilbert. The following information is taken from these documents.

The draft constitution provides for a Privy Council, an Executive Council and a Legislative Council. The Legislative Council will have twenty-eight members, of whom fifteen will be unofficial. Of the fifteen unofficial members, eleven will be from district councils, and at least two of the other four will be appointed to represent minority groups of considerable economic importance. The eleven members from district councils will be directly elected by the district councils from among their own members. Members of district councils will be elected by secret ballot.

The Sultan will be head of the Executive and all executive authority will be vested in his name. Brunei will continue as a British Protectorate, with the British Resident as the chief executive officer. A Chief Minister may be appointed later, and, in that event, the title of British Resident will be changed to that of British Adviser.

While ultimate authority will continue to rest with the Sultan, he must, if he disagrees with the majority opinion of his Executive or Privy Council, give his reasons in writing. As a constitutional monarch, the Sultan is required to seek the advice of his Executive in all matters affecting the good government of the State. "To keep the confidence of his advisers," says the Resident's statement, "it can, therefore, be presumed that he will, in practice, use his autocratic powers sparingly."

The Sultan has expressed an ardent hope that the constitution will be ready to come into operation in 1958, but this must remain a provisional target at this stage. The constitution is not yet a legal instrument. It consists of the Sultan's own proposals, and he has said that he is prepared to consider amendments and, if he considers it fitting to do so, to submit any suggested changes to the High Commissioner for consideration by the United Kingdom Secretary of State for the Colonies. The draft constitution will be submitted to the district councils and the State Council, and how soon it can be put into operation will depend on the number and nature of proposed amendments.

The Sultan hopes, in due course, to negotiate, with the United Kingdom Government, a new agreement covering the protection and defence of the State of Brunei.

Christmas Island

An Order in Council has been made detaching Christmas Island in the Indian Ocean from the Colony of Singapore and making the necessary arrangements for the administration of the Island as a separate colony (S.I. 1957 No. 2166). The intention is to transfer the Island later to the Commonwealth of Australia (see 580 H.C. Deb. *95*, December 19, 1957).

Ghana

Judicial Committee. Subsection (1) of section one of the Judicial Committee Amendment Act, 1895, provides that, if any person being or having been Chief Justice or a judge of the Supreme Court or of a superior court of certain of Her Majesty's dominions specified in the said Act, or of any other superior court of Her Majesty's dominions named in that behalf by Her Majesty in Council, is a member of Her Majesty's Privy Council, he shall be a member of the Judicial Committee of the Privy Council. An Order in Council has been made naming the Supreme Court of Ghana as one of the superior courts of Her Majesty's dominions for the purposes of the said Act. (S.I. 1957 No. 2165.)

Jamaica

Constitution. The Jamaica (Constitution) Order in Council, 1957, provides for further constitutional advance in Jamaica, including the reconstruction of the Executive Council as a Council of Ministers, which will normally be presided over by the Chief Minister. The main changes in the constitution, which were brought into operation on November 11, 1957, are as follows:

A Council of Ministers replaces the Executive Council and consists of twelve persons, ten of whom are drawn from the House of Representatives, the other two being unofficial members of the Legislative Council. The Chief

Minister will summon meetings of the Council and will normally preside, but the Governor will have the right to summon special meetings of the Council and to preside at them. The Chief Minister will continue to be appointed by the Governor, subject to a vote of confidence by the House of Representatives and other Ministers to be appointed by the Governor on the recommendation of the Chief Minister.

Two unofficial members have replaced the Colonial Secretary and the Financial Secretary on the Legislative Council; the Attorney-General is, therefore, the only official on the Legislative Council.

The former Colonial Secretary will now be known as Chief Secretary.

The Governor is empowered to make, in all existing laws and regulations, necessary modifications arising from the constitutional changes introduced by this Order in Council. (S.I. 1957 No. 1744.)

Reports. The Colonial Reports, 1955 and 1956 for Cayman Islands has been published by the Colonial Office. So also has the Colonial Report, 1956, for Jamaica.

Kenya

Constitutional changes. On November 8, 1957, the Secretary of State for the Colonies made a statement at a meeting with the Elected and Corporate Members of the Legislative Council held in Nairobi. In the course of this statement Mr. Lennox-Boyd said:

(1) " I recognise that, on merit, the African population is under-represented, in terms of members returned by a communal electorate, in relation to other groups. I therefore intend to provide for the addition of six such seats for the African population from constituencies to be subsequently determined. It is also intended to provide for one seat on the Government benches to be filled by a nominated representative from the Northern Province. . . . It is a further intention that the two seats at present filled by corporate members shall not remain beyond 1960."

(2) " Proposals were made last year by all groups for the creation of additional seats to reduce the disparity between Government and non-Government sides of the House and to provide a place in the Legislative Council for Ministers who draw support from more than one community. I intend in this connection to provide for the creation now of twelve such seats, four to be filled by Europeans, four by Africans and four by Asians, of whom, one shall be an Arab, one shall be an Asian Moslem and two Indians who are not Moslems. These seats will be filled through election by the whole Legislative Council sitting as an electoral college, voting by free and secret ballot. Methods of nominating candidates for election to these seats will be decided later."

(3) " The number of such seats, designed to provide representation not based on purely communal electorates, may be increased during the next ten years, but, during this period, the proportions, between and within the groups which I have indicated, will not be varied. In addition, any alteration in the total number of seats, or in the method of filling them, will be subject to the approval of the Council of State, to which I will refer later."

(4) " These additional seats of all kinds may add considerably to the non-Government side of the House. Provision will be made to ensure that His Excellency [the Governor] will, at all times, be able to appoint such numbers of nominated members as will secure an adequate Government majority."

(5) " In any future expansion of the Legislative Council there will be no additional seats based on election by purely communal electorates."

(6) " Once the extra African seats and non-communal seats proposed have been filled, two Ministers will be selected from African members. Of the two African Ministers, one will hold the portfolio of Housing and the other a portfolio which will include Adult Education and Community Development. The European and Asian Ministers without Portfolio will be given defined

responsibilities. It will be seen that the total size of the Council of Ministers remains as fixed last year. It will be fully large enough, and I do not think that efficiency would be served by any further increase."

(7) "The division of Ministerial offices, as between members of the public service and unofficials, will remain as at present, subject to the Governor's discretion to make adjustment in the burden of responsibility carried by individual Ministers. The portfolios of Finance and of Forest Development, Game and Fisheries may be filled from within or without the public service. Of the remaining unofficial Ministers, four will be Europeans, two Africans and two Asians. The position of Adviser on Arab Affairs, who is entitled to participate in the Council of Ministers, will remain unchanged."

(8) "There will be not less than three, and not more than six, Parliamentary Secretaries, whose office will be changed to that of Assistant Minister. It is the present intention that two of the Assistant Ministers will be Africans, one an Asian and one an Arab."

(9) "If, in the opinion of the Governor, there is no suitable member of the Legislative Council who is willing to accept office as an unofficial Minister or Assistant Minister, it will be open to the Governor, subject to the instructions of Her Majesty, to appoint a suitable person, preferably, but not necessarily, of the race in question. A person so appointed may be within or without the public service and, if not already a nominated member on the Government side of the Legislative Council, would be nominated to such membership."

(10) "In order to protect any one community against discriminatory legislation harmful to its interests, there will be created a Council of State with certain defined powers of delay, revision and reference. I shall, in consultation with my colleagues and with His Excellency, determine the powers, functions and composition of the Council of State. It will be convened whenever the occasion arises to exercise its functions." (Cmnd. 309.)

In a statement issued to the Press on November 13, 1957, the eight African elected members said that after very serious consideration they had decided to reject the new constitutional proposals and to advise their community accordingly. Referring to this statement in the House of Commons on November 14, 1957, Mr. Lennox-Boyd said that he could not regard it "as being in any sense representative of African opinion as a whole . . . in my view, and in the view of my colleagues, the settlement I have announced will commend itself to men of good will of all races, and I am content to wait to see how the pattern unfolds." (577 H.C. Deb. 1112–1116.)

Leeward and Windward Islands

Courts. An Order in Council has been made amending the Leeward Islands and Windward Islands (Courts) Order in Council, 1939, so as to provide—

(*a*) that the Supreme Court of the Windward Islands and Leeward Islands shall not have original jurisdiction in any case in which exclusive original jurisdiction is exercisable by the Federal Supreme Court established by the Constitution of the West Indies; and

(*b*) that the Court of Appeal for the Windward Islands and Leeward Islands shall not have jurisdiction to hear an appeal from the Supreme Court in any case in which exclusive jurisdiction to hear such an appeal is exercisable by the Federal Supreme Court. (S.I. 1957 No. 2167.)

Mauritius

Report. The Colonial Reports for 1955 and 1956 have been published by the Colonial Office.

Nigeria

Constituency Delimitation Commission. Lord Merthyr has been appointed chairman of this Commission whose task is to recommend the division of the Federation into 320 electoral districts of approximately equal size. Recommendations will be submitted to the Governor-General.

Minorities Commission. Sir Henry Willink has been appointed chairman of this Commission whose terms of reference are set out at [1957] P.L. 375–376. The report will be submitted to the Secretary of State for the Colonies.

Southern Cameroons. An Order in Council has been made enabling the Governor-General of the Federation of Nigeria to make provision for the election of members to a new House of Assembly that it is proposed should be established for the Southern Cameroons and permitting registration of voters to take place and other preliminary measures to be taken in pursuance of any such provision. (S.I. 1957 No. 2060.)

North Borneo

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Rhodesia and Nyasaland

Amendment to the Constitution. On July 31, 1957, the Federal Assembly of the Federation of Rhodesia and Nyasaland passed by a two-thirds majority the Constitution Amendment Bill under the procedure laid down in Articles 97 and 98 of the Federal Constitution. On August 1, 1957, the African Affairs Board, by a majority, presented a request, under Article 75 of the Constitution, that the Bill should be reserved by the Governor-General for the signification of Her Majesty's pleasure. Under the Constitution, Her Majesty's assent may be signified, in these circumstances, only by Order in Council, the draft of which must lie before each House of Parliament for forty days. The draft was laid on October 31, 1957. On November 25, 1957, the Opposition moved in the House of Commons that the draft Order be not submitted to Her Majesty. The motion was lost.

The Constitution Amendment Bill increases the membership of the Federal Assembly from thirty-five (of whom six Africans and three Europeans represent African interests) to fifty-nine (of whom twelve Africans and three Europeans will represent African interests).

The African Affairs Board regarded the Bill as "differentiating" under Article 71 of the Constitution which defines a differentiating measure as "a Bill or instrument by which Africans are subjected, or made liable, to any conditions, restrictions or disabilities disadvantageous to them to which Europeans are not also subjected or made liable, or a Bill or instrument which will, in its practical application, have such an effect." (See the Draft Order in Council (H.M.S.O. Code No. 58–9133); a White Paper on the Bill (Cmnd. 298) containing the views of the African Affairs Board and those of the Federal Government; and the debate in the House of Commons on November 25, 1957 (578 H.C. Deb. 816–948).)

Northern Rhodesia. On November 8, 1957, the House of Commons debated African advancement, on the adjournment (577 H.C. Deb. 569–580).

The Colonial Report, 1956, has been published by the Colonial Office.

Sarawak

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Sierra Leone

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Singapore

The Prime Minister said that Singapore would be known in future as the State of Singapore. A separate Singapore citizenship would be created, for which the necessary local legislation had been enacted. Parliament would be asked to amend the British Nationality Act, 1948, so that Singapore citizens would be recognised as British subjects and Commonwealth citizens (577 H.C. Deb. 34–35, November 5, 1957).

See also **Christmas Island** (above, p. 99).

Tanganyika

Legislative Council. An Order in Council has been made to increase the total number of *ex officio* and Nominated Members of the Legislative Council to thirty-four, to increase the number of Representative Members to thirty-three, to increase the number of constituencies into which the Territory shall be divided from nine to ten, to provide for the filling of certain seats in the Legislative Council by appointment instead of election where no candidates have been nominated for election, and to increase the maximum life of the Legislative Council from three to five years. Some minor amendments to the Tanganyika (Legislative Council) Order in Council, 1926, have also been made. (S.I. 1957 No. 1875.)

Uganda

Police Service Commission. An Order in Council has been made to provide for the establishment of this Commission. The functions of the Commission are advisory.

(1) The Governor in his discretion may refer to the Commission for its advice any question relating to the appointment (including promotion), or termination of appointment or to the dismissal or other disciplinary control of police officers or of any police officer or to any other matter which, in his opinion, affects the Police Force or any police officer.

(2) The Governor, acting in his discretion, may, by regulations published in the Official Gazette of the Protectorate, authorise any public officer or class of public officer or any police officer or class of police officer to seek on his behalf the advice of the Commission on any matters on which the Governor may seek advice under the provisions of subsection (1) of this section.

(3) It shall be the duty of the Commission to advise the Governor on any question which he shall refer to them by virtue of the provisions of this section, but the Governor shall not be required to act in accordance with the advice given to him by the Commission.

(4) The Chairman of the Commission shall at all times have direct access to the Governor. (S.I. 1957 No. 2168.)

Virgin Islands

Courts. An Order in Council has been made which provides for conferring on the Federal Supreme Court of the Federation established by the West Indies (Federation) Order in Council, 1957, jurisdiction to hear and determine appeals from superior courts of the Virgin Islands, provides that any such jurisdiction shall be in substitution for jurisdiction conferred by the West Indian Court of Appeal Act, 1919, on the court established thereby to hear and determine appeals from those courts, and makes provision for certain incidental, consequential and transitional matters. (S.I. 1957 No. 1746.)

BOOK REVIEWS

Administrative Organisation. By Poul Meyer, ll.d. [London: Stevens & Sons. 1956. 325 pp. 45s.]

Professor Meyer's book is sub-titled " A Comparative Study of the Organisation of Public Administration." Whether it lives up to its sub-title will depend upon the expectations aroused in the reader by the appearance of the word " comparative "; for some of us expect perhaps too much, while others are content to find in this word not more than the dictionary definitions of the verb—" to liken . . . to mark similarities and differences . . . " In both law and political science students wonder what it is expected will be achieved by putting our studies on a comparative basis. For the purpose of enriching our knowledge of our own traditions, institutions and practices, comparison is important; perhaps also for gaining ideas about the ways in which our practices *might* be improved; insular knowledge is not enough. A generalisation is often the beginning of fruitful intellectual activity—particularly in political science—and if it is to be of more than local interest it is as well to have a wide-ranging knowledge of practices in other countries where " similar " problems present themselves. But if we expect too much we can easily be disappointed. Few students have the talent to become great systematisers and without a " general theory " we are thrown back upon particular theories of particular systems of government. We know our own systems, and we cast anxious or nervous glances over the waters to see if anything there is occurring which may happily translate our particular theory into a general theory or, unhappily, may make our local theory look rather more like a prejudice. The problem is to find a " general theory." This can be done if one is imaginative and bold, and unconcerned about the communicability of the theory outside a small circle of the initiated. A few new words manufactured for special purposes can then be defined and sub-defined until the inventor and his disciples feel that they have adequately encompassed human experience with their vocabulary. They will have encompassed them no doubt, and will probably have also succeeded in imprisoning the raw and lively facts within their new verbal citadel, and those who prefer freedom will be mocked at by those who have found security within their new vocabulary.

A second approach, and it is that of Professor Meyer, is to let the facts behave as they will, study them closely, and then gently and for no particular purpose give their patterns familiar names and treat them most tentatively. This approach lets the facts have their freedom, but it now becomes necessary to ask, What is the purpose of such disinterested observation? If we look at Danish facts, then at Swedish, then at British and American, what are we achieving? Of course we learn a great deal we did not know before, but as lovers of freedom for the facts we are not so naïve as to believe that facts have meaning outside the culture pattern in which they have their being. We have the prospect of a never-ending search; administration means politics; politics means economics and history; history means literature and tradition—we'll be up there with Hegel any minute.

It seems that if we are to avoid the morass of Universal History we must have a definite and very limited purpose in mind when we do our comparative studies. We ought to take a specific activity. How is a law made? How long does it take to make it? How much are legislators paid? Why this rather than some other amount? If we do these small studies carefully, but with a wide-ranging interest in the surrounding environment, we can learn much of importance about both the specific object of study and the environment.

Professor Meyer's book is a most useful compendium of facts about the organisation of public administration in Scandinavia, France, Germany, Britain and America. To call it a compendium is perhaps a little unfair for it is of its kind—and this must be said—a most readable volume. It is admirably critical of the vocabulary and methods of some schools of public administration, and Professor Meyer's knowledge of these matters would seem to be almost complete. The book is very well ordered into sections dealing with the theories and approaches to administrative studies and sections dealing with the concepts in action; and like a welcome lunch in the midst of a day's recreation, there is a full and appreciative account of Parkinson's Law. But one arrives at the end still hoping for some generalisations, some observations about the journey which has just been undertaken. There are none; no aphorisms, no interesting paradoxes, no thought for the day. Professor Meyer's book will do good if it is regarded as a base upon which to mount bold and detailed studies of particular areas in the field of public administration.

Theorists of public administration have so far failed to arouse the interest of other scholars. While often fascinating in their analysis of particular problems they have failed to persuade the intelligent layman that there is anything exciting in their subject *per se*. Sociologists interested in administration have had more success. Is this perhaps because in the case of these sociologists their political premisses are visible, and, even if disputable, at least bearing a vital relationship to their whole argument? Professor Meyer supports the view that public administration is about the administration of persons, not merely about methods and things. But if the politics is taken out of administrative studies not many will be aroused by the bloodless battle of categories which is left. When trade union leaders, Cabinet ministers, industrial planners and executives become, alike, "decision makers" a sense of urgency and reality is lost. As there are very few "rules" in the game of public administration, and as most of them can be, and are, frequently broken with merely plausible reasons given, in the absence of urgency and a sense of reality, few sophisticated minds will wish to participate in this sort of a game. If we do not know what is at stake we cannot be expected to become very interested; and if we cannot after a lengthy and often fascinating account of different practices give a more competent answer to the question "how should we administer this and why?" it must be said that as an attempt to draw principles from practice this book fails, and we are no more enlightened than before. Public administration is wanted as a method of reaching policy ends with speed, economy, and due consideration to the political climate in which it has its being. Nobody wants it for itself.

R. H. PEAR.

THE ORGANIZATION OF BRITISH CENTRAL GOVERNMENT, 1914–1956. A Survey by a Study Group of the Royal Institute of Public Administration. Edited by D. N. CHESTER, C.B.E., and written by F. M. G. WILLSON. [London: Allen and Unwin. 1957. 457 pp. 32s.]

TOWARDS the end of this book the authors offer the sound observation that "the beginning of wisdom in this context is the firm rejection of any belief in the possibility of defining a rigid and comprehensive framework of organisation into which every function of government can be fitted for all time." But they add that they "are convinced that within the limits set by the essential need of flexibility, the efficiency of administration can be enhanced by the constant study of the factors influencing the structure of government and by the application of such knowledge as can be distilled from that study." And they conclude with the modest hope "that a little of that knowledge is contained in these pages." One can say at once that their hope is amply justified. The book is full of valuable information about the organisation and working of British government since 1919. The information is presented lucidly and forcefully, and, while it is usually allowed to speak for itself, it is accompanied from time to time by wise judgments and sober conclusions. Many dashing generalisations about modern British government will seem less convincing after a reading of this book.

The subject is notoriously difficult to write about authoritatively. Those who are keen to write know it only from the outside; those who know it from the inside are not keen to write. Aware of these difficulties, the Royal Institute of Public Administration took steps to overcome them. It set up a study group containing not only such experienced academic authorities as Mr. D. N. Chester, Warden of Nuffield College, Oxford (who acted as chairman and also edited the volume), and Professor W. A. Robson, but also such lively and diverse administrators as Sir Robert Fraser, Sir Horace Hamilton, Sir Patrick Laird, Dr. A. H. Marshall, Sir John Maud, Dame Evelyn Sharp and Sir John R. Simpson. Their method of study is described in the preface of the book. Each major Government Department contributed a memorandum on the changes which had occurred in its own field since 1914. This information was supplemented by independent research, and first drafts of the various sections of the book were prepared. Those drafts were then discussed by the Study Group with "witnesses," many of whom hold, or have held, high office in the Civil Service, or who had special knowledge of the particular field covered by the inquiry. The first drafts were then revised and often sent for further comment to the witnesses or to departments or to other knowledgable persons. In the course of some twenty meetings, the Group culled much from the memories of people who had lived through the period and taken part in shaping the organisation of the Central Government (p. 8). By this means it was possible to combine inside knowledge and academic detachment, a combination which the Institute, with its comprehensive membership and contacts, is uniquely qualified to produce. The result is a book whose success justifies the method adopted. It is right to add, however, that a group cannot (or perhaps should not) write a book and that in this case the Institute was fortunate in choosing Dr. F. M. G. Willson, Gwilym Gibbon Fellow of Nuffield College, as their writer. He has produced a coherent and readable text, free from jargon, compact and concise.

It is impossible in a review to describe the full range of topics with which the book deals. It must suffice to say that of the ten substantial chapters, the first and the last, are perhaps the most stimulating. In some ways they must have been the most difficult to write. The first chapter provides a general background with three "panoramic" views of the central administration—in 1914, in 1935 and at the end of 1956. The last is a discussion of the factors which influence the distribution of functions, together with reflections on the way in which problems of governmental organisations can be handled. Of the eight chapters in between, seven deal with various fields of governmental activity—finance, trade and industry; law, justice and public order; social services; external affairs; defence; scientific research; and common services—and the eighth with the development of devices and institutions for the central co-ordination of government. It is obviously an enormous field, and to present it so fully and so intelligibly is a feat of compression and of exposition upon which the editor and the writer are to be congratulated.

A word must be added in praise of the valuable series of tables, diagrams and appendices into which is gathered a mass of statistical and bibliographical information. There is, for example, in appendix C a chronological account of administrative changes since 1914; there are two diagrams showing the organisations of scientific research under the Privy Council in January and December, 1956, respectively; there is a table showing the development of the use of the term "Minister" in the titles of departmental Ministers—to mention only a few out of a score or so. The careful student will find here much important information that is either unobtainable or not so readily available elsewhere.

K. C. WHEARE.

THE STUDY OF COMPARATIVE GOVERNMENT AND POLITICS. By GUNNAR HECKSCHER. (Preface by W. A. ROBSON). [London: Geo. Allen and Unwin. 1957. 172 pp. 18s.]

THE theme of this little book is well-worn, but no less important for that: what *is* Comparative Government, and how can we set about studying it? It is clear that we can study *foreign governments*, though not without some risk for there are many traps for the unwary and the most distinguished scholars have not always emerged unscathed. Nevertheless, a fresh, critical and uncommitted traveller may often see even the obvious more clearly than the native. It is clear, too, that (in a limited sense at least) we can study *foreign governments comparatively*. As Professor Heckscher puts it: "We want to draw on foreign examples which may give us ideas for the development of our own institutions. Similarly, we may flatter ourselves that a knowledge of our institutions may help others." Such studies may have great therapeutic value. Political scientists who have been asked in recent years to design constitutions, electoral systems, schemes of decentralisation and local government, and what have you, for former colonial and dependent territories, would agree that it concentrates the mind wonderfully when one's own theories, preconceptions, and institutions are "on trial."

All this is obvious. What is not obvious is whether we can go beyond this to study *comparative government*, or more simply, *government*, and if so, how. It is to be regretted that this book says much about the obvious but adds little to the search for answers to these more important questions. As Professor David Easton has remarked in his book *The Political System*, "As comparative government is known today . . . it seldom passes far beyond the level of pure description of the institutions and practices of individual political systems. The comparisons remain largely at the descriptive level." Much of the present book is concerned with just that: there are long lists of questions which can be asked about a variety of political institutions, such as nationalised industries, political parties, and electoral systems, and about political practices such as the control of foreign policy and parliamentary procedure; but there is little which would lead us towards what Easton calls "comparisons with theoretical significance." There is, it is true, a recognition, inconclusive though it is, that there is a need to develop a conceptual framework, and that without such a framework comparisons can scarcely be fruitful, but at the end of the book the reader is no nearer to a feeling that such a framework is in sight. Indeed, it is to be feared that the book obscures rather than clarifies the crucial issues. Interesting ideas are taken up and hurriedly laid aside, concepts introduced only to be discarded without proper examination. The result is a profoundly disappointing book which is at once diffuse, repetitious, and inconclusive.

To some extent these failings may be explained, perhaps, by the circumstances in which the book came to be written. It is not wholly Professor Heckscher's book. It originated in an International Political Science Association Round Table, held in Florence in 1954, which was attended by scholars from a dozen countries. The book is not, however, a "report" of the conference in the usual sense, though Professor Heckscher was the *rapporteur-general*. We are told (twice) that he drew "fully and freely" on the conference papers and discussions, but also that he was able to add his own interpretations and comments. These (when they can be positively identified) are invariably down to earth, for example, when he remarks, *inter alia,* that attempts to formulate a "scientific" terminology in political science "have frequently proved more ridiculous than precise," and that "in political science . . . 'scientificness' is hardly more than an attitude of mind"—all this in refreshing contrast to the higher flights of fancy apparent in certain passages quoted from other scholars, *e.g.,* that political theory "will come into its own when it reaches beyond empiricism, and employs scientific method after the manner of the great physicists."

It is clear, however, that the product of this somewhat odd scholarly enterprise is neither flesh nor fowl: it is not a report emerging wholly from what Professor Robson engagingly calls "the great clatter of debate," nor is it the product of a single mind. The result, whatever the reasons, is a muddle, and in saying this I am painfully conscious of the difficulty of establishing a satisfactory methodology for the study of comparative government. We cannot complain because Professor Heckscher has failed to do what no one else has yet succeeded in doing; indeed I share many of his apparent misgivings about the possibility of such an enterprise (at least as it is conceived by some people). There are many perplexing problems to be overcome if we are to get beyond mere detailed description of institutions; but I do not believe that this book does anything to help to resolve them; in many respects it simply compounds the confusion. In part, I suspect, the confusion arises because we are even yet far from clear in our minds as to what we may hope to achieve by such a study. Indeed, the most lasting impression received from reading this book (apart from the many distinctly odd notions about "scientific method" and about the possibility of applying the techniques of the physical sciences to the social sciences which lie scattered about—and between—its pages) is the realisation of the extent to which, even now, political studies are rooted in the ancient past: the proliferation in political writing of what the late A. F. Bentley called "brain-spooks"—explanations which are not explanations at all—our readiness to accept *ad hoc* hypotheses which only "explain" the facts which give rise to the hypothesis and nothing more, our search for "essences"—for the "nature" of a political party, federalism, sovereignty, and so on. And do we not (some of us at least) secretly hope that by studying institutions comparatively we may yet, in Baconian fashion, squeeze the essential juice from the collected grapes of fact? There is a good deal in this book (in spite of all the lip service to what scientists do—or what we think they do) which seems to confirm this rather depressing belief.

J. W. Grove.

PUBLIC LAW

Summer, 1958

COMMENT

ADMINISTRATIVE tribunals and delegated legislation have long excited the constitutionalists and other lovers of freedom. If fear of the power of the executive is the cause of this excitement, much fuss has been made about too little. Glance down that schedule in the Tribunals and Inquiries Bill which lists the tribunals to be under the general supervision of the proposed new Council; and consider how many tribunals there can be said to interfere with the rights of the subject and how many, on the other hand, are consequential on the giving of new rights. Are the powers of the tribunal and service committees of the national health service to be regarded with horror or some measure of relief? It would surely be difficult to raise an army to fight the Industrial Injuries Commissioner and his tyranny. And even those who can afford to be interested may not view with complete dismay the tribunals to pass judgment on independent schools. Tribunals are generally institutionalised bits of decision-making. Their very existence and the measure of their separateness from Government Departments are indications of less, not more, concentrated power. But the power, distributed though it may be, is still the same in sum. And the power is great. It is the power to take land compulsorily that lies behind the jurisdiction of the Lands Tribunal, the power to deprive an individual of his freedom without his fault that lies behind the national service committees and tribunals, the power to tax that lies behind the commissioners. We accept this power as a necessary part of our society. The camel goes down, hump and all. But the gnat takes some digesting.

Of course, it is easy to say that, just because the executive has such powers, we must be vigilant about particular procedures and cases. As the Lord Chancellor said in moving the Second Reading of the Tribunals and Inquiries Bill on April 1, 1958: " a fair balance should be struck between the right of the individual and the needs of the community." Lord Denning said that the Bill would " do much to redress the balance between the individual and Government Departments." Lord Hylton felt that "the balance of justice has been weighed increasingly against the individual when he finds himself, often against his wishes, in opposition to Ministers, Government Departments and public corporations" and so welcomed the Bill. Metaphors have been known to become things, and this balance we are constantly encouraged to strike, redress and weigh anew is beginning to seem substantial. We are really beginning to think that what is needed, to offset the growth of centralised power in our modern industrial and welfare State set in a competitive, harsh and rearming world, is the creation of a Council on Tribunals and a right of appeal on a point of law.

The Franks Committee began to lead us astray. In the most quoted paragraph of its Report, the Committee said: "tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration." The dichotomy is false. For, in the process of administration, adjudication becomes necessary. The adjudication is a method of solving a difficulty which arises in the course of administering, say, a rehousing policy or a school building policy, or a national insurance policy or a health service or an army. And against this background, the differences between tribunals and inquiries almost disappear. For it is only at that point of administration where policy decisions of any size become unimportant that tribunals can be entrusted with independent adjudicatory functions. Where the Minister can say: "It does not matter to me what the decision is," there he will set up a tribunal. The adjudication is still part of the administration but an unimportant part. The picture is not one of Parliament rising in its strength and insisting that here an independent body must be created to keep the balance between the individual and the State. It is of the Minister saying that it would be simpler and cheaper and less troublesome all round to have these details settled neither by the courts nor by his Department but by a tribunal. We know that inquiries are part of administration. There is some unreality in distinguishing tribunals by a characteristic which merely emphasises their relative unimportance. No one denies the importance of their decisions to the individual. But these decisions spring from the power of the whole administrative activity. And it is this power which determines how the balance shall swing.

Certainly the Bill is to be welcomed, as is the much more important circular we reproduce on p. 186 below. But if we are really concerned with the so-called balance, if we do really see the State as a perennial conflict between authority and the individual, then these are little measures of not much significance. Certainly the Bill does not justify Lord Denning's large phrases. To him it was the first of three chapters in a new Bill of Rights; the others were to deal with inquiries and maladministration. "The clause," said Lord Denning, "which it seems to me will do most to maintain our liberties is Clause 10." This Clause states that any statutory provision that any order or determination shall not be called into question in any court or any statutory provision which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus. This clause is expressly excluded where there is a statutory right of application to the High Court and does not seem likely to have much effect.

More important may be the right of appeal in point of law to the High Court from the decisions of a number of specified tribunals, given by Clause 8. This right is not extended to cover national insurance, industrial injuries or national assistance tribunals. Certiorari will now certainly issue to control these three tribunals, under Clause 10, for it is the primary function of the Commissioners to decide points of law and to publish their decisions with reasons. So what Clause 8 excludes, Clause 10 extends to embrace.

Implicit throughout the Report of the Franks Committee and this Bill is the belief that review by the courts is an unmixed joy, that having this fine body of men and this magnificent institution we should be foolish not to use it to the utmost. There seems here to be some measure of confusion. If the courts are so remarkable, why have an Industrial Injuries Commissioner? The answer comes pat: speed, cheapness, informality, expert knowledge. Then why extend certiorari to review his decisions for errors of law on the face of the record? To which the answer seems to be that the judges know better than he what the statutory provisions must mean; that they are more expert than he. If so, the next question is obvious. Should the other advantages—speed, cheapness, informality—be sacrificed to an alleged greater expertness? And is a High Court really likely to be cleverer at finding the meaning of the Industrial Injuries Act than the Commissioner?

The truth surely is that the courts are not so efficient as is sometimes pretended, that some judges are first rate, some are second rate, and a few are calamitous. Lord Denning almost pointed this out. Only six speeches were made on the Second Reading of the Bill in the House of Lords, and two of these were delivered by the Lord Chancellor. Lord Denning, as has been suggested, was rather carried away and it was a pity that he hit on the idea of talking of a new Bill of Rights as this further inflated the relatively unimportant measure before the House. Yet his emphasis on maladministration and Crichel Down brought some reality into the debate. And he ended: " But just remember this. We are seeking to maintain the rule of law, but the rule of law is dependent upon the judges and the lawyers of this country. They must maintain their high standard. They must be independent. They must be upright and ready to do justice equally between man and man, and between man and the State. It is only if they can maintain their high standards that we are justified in claiming for them this Bill of Rights, to put tribunals and others under the law."

The esoteric, peculiar and archaic framework within which the courts operate, together with the cost of litigation, makes the average citizen reluctant to seek judicial remedies for his wrongs, and makes business men prefer arbitrators to whom, as one of them put it recently, " we do not have to explain everything." Rights of appeal from tribunals to the courts may correct some injustices. But though Her Majesty's judges may rejoice at this further opportunity for them to ensure that right prevails, Her Majesty's subjects may prove less enthusiastic.

The House of Commons has set up a new Select Committee on Procedure. And this will, as before, no doubt involve a full examination of the purpose and nature of what we call Parliamentary Government. Could not our judges look at their own system in a similar spirit of self-criticism ?

UNCLE SAM AND MOTHER INDIA

IN the summer of 1957 Mr. C. B. Agarwala, a former judge of the Allahabad High Court, Mr. G. N. Joshi, the well-known writer on Indian Constitutional law, Mr. Justice Mukharji of the Calcutta High Court, Mr. S. M. Sikri, Advocate-General of the Punjab, and Mr. P. K. Tripathi, a member of the Law Faculty of the University of Delhi, joined Professor C. Byse of Pennsylvania, Professor W. H. Mann of Indiana, and Professor N. L. Nathanson of the Northwest University in a conference on Indian Public Law held at Stanford Law School, California, under the chairmanship of Professor L. F. Ebb. With two research assistants, in the course of five weeks they examined a number of problems from the comparative angle with the object of finding a proper balance between public and private interests, and fifteen papers on the subjects selected for study have now been published.[1] They form the starting point of the research programme for the American-sponsored Indian Law Institute recently established in Delhi, but copies have been widely circulated among lawyers and institutions likely to be interested. It is understood that copies are still purchasable, and this publication is worthy of study, for the information conveyed, for the subjects deserving research enumerated, and the implications which the entire project suggests.

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[1] Public Law Problems in India, A Survey Report, Proceedings of a Conference held at Stanford Law School, July 15–August 16, 1957. Edited by Lawrence F. Ebb. School of Law, Stanford University, California, $2.50.

The Report commences with suggestions for research into administrative law in a paper which is the joint effort of two American and two Indian members of the conference. The necessity of defining the criteria by which a legislature should determine whether a particular policy should be implemented by an executive officer, an independent commission, a government-controlled corporation, or by the courts is stressed, and problems relating to the scope of judicial control of administrative bodies are set out.

Professor Byse contributes two papers. The first makes suggestions regarding a uniform administrative procedure code, but, while the Law Commission appointed in 1956 recognised the importance of the questions raised, no influential body of Indian opinion has yet expressed approval of legislation with this object in view, so that the paper is largely a summary of American research and opinion. In the other paper he deals with notice, necessity for public hearing, the right to be represented, rules of evidence, use of technical knowledge, and cognate matters, with references to American, Indian, and English case-law and literature.

Professor Nathanson and Mr. Sikri have dealt with the right to a fair hearing, in relation to licences (where the Indian law generally approaches the American law rather than that laid down in *Nakkuda Ali's* case [1951] A.C. 66, which regards a licence as a privilege to be granted and withdrawn at discretion), requisitioning, dismissal of civil servants (where the Indian law lays greater emphasis on the necessity for inquiry than the American law), and banishment.

Mr. Justice Mukharji contributes no less than five papers. The first, dealing with privileged government documents, sets out the Indian law, with analogous American and English decisions. It is accompanied by a valuable staff memorandum, which summarises the situation in India and the United States, and contains a useful bibliography. Yet, it would seem, that, in the existing world situation, the trend towards greater official reticence is likely to continue, and the probability of any government promoting legislation to benefit the citizen is remote. The same writer has a paper on judicial limitations on investigating commissions. In India the law on this matter is mainly in the Commissions of Enquiry Act, 1952, commissions appointed under it being subject to judicial control by writ petition, so that comparisons with congressional committees in the

United States are difficult. A third paper deals with conflict between the Constitution and international agreements, and between a law implementing a treaty and an ordinary law. A fourth deals with conflict between Union and State powers, and the fifth, probably the most interesting of Mr. Justice Mukharji's contributions, deals with the new legal problems arising from the use of atomic energy. In this connection it may not be generally known that India has an Atomic Energy Commission, which in four years' time will be producing electricity in large quantities. The liability of Government and others for injuries resulting from radiation and accident will soon be raising practical problems. The rule in *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265 will doubtless be a suitable starting point, but in India the liability of Government in tort is, by an express provision in the constitution, the same as was the liability of the East India Company before the passing of the Government of India Act, 1858. It is usually said that Government is not liable for any act done in the exercise of "sovereign functions," whereby, in one case at least, it was able to resist liability for negligence in the management of a hospital.

Mr. Joshi and Professor Mann have discussed the Fundamental Rights of freedom of expression and assembly. The valuable suggestion is made that, in considering the scope of these rights, which may be "reasonably" restricted in the interests, *inter alia*, of public order, the American "clear and present danger" test would be of assistance. Professor Mann proceeds to consider contempt of court, which comes within the purview of the recognised restrictions to freedom of expression; there seems no noteworthy difference between Indian and American law. Mr. Joshi proceeds to deal with amendments to the Indian constitution, and not everyone would agree that the provisions for constitutional amendment have hitherto invariably been used reasonably and fairly in the interests of India. Of the seven amendments which have been made, some, particularly those affecting the Fundamental Rights, would not have been possible but for the comparative absence of difficulty in effecting amendments, and the overwhelming majority of Congress in Parliament, which does not accurately reflect the voting strength of the parties in the electorate. Some of these amendments were simply intended to set at naught inconvenient judgments. No less than twenty statutes were given *ad hoc* constitutional validity. It is hardly surprising to find the Supreme Court now reluctant to show the courage with which it acted while Mr. Justice Mukharji was Chief Justice of India.

Mr. Agarwala deals with rights of interest to foreign corporations. Art. 31, as now amended, affords a trading corporation no protection against a law putting it out of business otherwise than by transfer of title to the State, and in that case it is at the mercy of legislature as to the amount of compensation. It seems extremely doubtful whether an Indian subsidiary of a foreign country could claim Indian citizenship, but the discussion of the " reasonable restrictions in the public interest " which legislation may impose on the citizen's rights to hold property and carry on business, and especially of regulation of trade in essential commodities by licences and quotas, shows a high degree of similarity between Indian and American law.

But the most noteworthy contribution to this volume is Professor Ebb's paper on freedom of inter-state trade and intercourse. It is surprising to find that so little notice has as yet been taken of Arts. 301 to 307 of the Indian Constitution, which allow restrictive central laws, if they do not discriminate between states, except to remedy local scarcities of goods; state laws may not impose discriminatory taxes, but state laws enacted with the President's sanction may impose reasonable restrictions. It seems to have been too readily assumed that federalism being new in India, and the states, till recently being agglomerations of territory created by historical accident for administrative convenience, the conditions calling for the use of these provisions of the Constitution have not yet come into existence. When the Constitution Act of 1919 was applied in Burma, then an Indian province, one of the first activities of the new legislature was to pass Bills restricting the immigration of Indians, who were generally regarded as a menace to the economic status of Burmans; this legislation was promptly vetoed by the Governor-General. As Professor Ebb has pointed out, Uttar Pradesh, the State which has longest preserved its territorial identity, has a number of statutory provisions which are liable to be impugned as violative of the constitutional limitations on legislation restricting inter-state trade and intercourse.

The U.P. Sugarcane Act, 1953, imposes restrictions on persons outside the State desirous of access to sugarcane produced in the State. In *Tika Ramji's* case, A.I.R. [1956] S.C. 676, the statute was impugned as being in respect to a matter within the exclusive power of the Union, as being repugnant to or repealed by a central law on a concurrent subject, as infringing the fundamental right to equal protection of the laws, and the rights to deal with property and carry on a business. Having dealt exhaustively with these points, the court briefly rejected the remaining objection, that the statute restricted inter-state trade, on the ground that the restriction was reasonable. As Professor Ebb remarks, the question whether the President's assent to the introduction of this legislation, as required by Art. 304 (b), was not touched on. But the point was presumably not raised; the assent may have been given, or the lack of it might have been cured under Art. 255 by the President's subsequent assent. The remarkable fact is that the main attack upon the statute was on other grounds; the principle of freedom of inter-state trade was only relied on as a last resort, and not seriously pressed.

The statute thus upheld is by no means the only U.P. statute worthy of note in this context. The U.P. Pure Food Act gives executive authorities discretionary powers to control marketing of foodstuffs, ostensibly to protect the health of the inhabitants of the state, but in terms wide enough to permit the powers to be used to further the interests of producers in the state. The U.P. Fisheries Act authorises the state Government to regulate the export of fish, and the U.P. Electricity Act provides for control of electric power generated in the state. Professor Ebb has cited a number of American authorities dealing with problems suggested by these statutes, from which two main principles seem to emerge: in a federation the nation, not the state, is the economic unit; a state may not impose restrictions on inter-state trade with the object of advancing its own commercial interests at the expense of another state.

Owing to the constitutional difficulties which have arisen in relation to powers to tax inter-state sales, there is inevitably in India a sharper perception of the scope of Art. 304 (a) which prohibits discriminatory state taxation on imported goods. In *Md Siddiq's* case, A.I.R. [1956] M.B. 214, exemptions from liability to tax in favour of vendors of locally produced cloth were held to offend against this article, but there are not lacking decisions in which the point should have been but was not raised.

In *Joshi's* case, A.I.R. [1955] S.C. 334, a medical college was held entitled to charge higher fees to students not resident within the state, after a consideration of the application of the fundamental rights forbidding discrimination. The argument in *Vithal Maruthi's* case, A.I.R. [1952] Bom. 451, based on unconstitutional discrimination, failed to convince the court that a statute providing for the banishment from Bombay of beggars neither born nor domiciled therein was unenforceable. In neither of these cases was the relevance of the principle of freedom of inter-state intercourse considered.

Professor Ebb has not only classified the problems presented by the application of the principle, but he has provided a body of doctrine, based on American decisions, suggesting solutions. A teacher of Indian Constitutional law can only express gratitude for the new light thrown on the scope and effect of this part of the Constitution, but that is not the only purpose which this paper will serve. It will inevitably inspire Indian lawyers to pay more attention to this part of their constitution, and experiment with the doctrines suggested. In this part of the law we shall see more attention paid to American authorities, for what has the Commonwealth lawyer to offer as an alternative? There is a large body of case law on sec. 92 of the Australian Constitution, but this " has caused more differences of judicial opinion and greater conflict between decisions than any other provision of the Constitution "; in the words of Mr. Justice Dixon " what has been made clear has not found acceptance, and what has been accepted has yet to be made clear "; Professor Sawer has described it as the one great Australian constitutional failure, due in part to limitations on legal technique.[2]

This may cause the English lawyer to ask himself how long he will be able to regard the law of India as mainly derived from the law of England. For rules governing problems arising from federalism the Indian lawyer seeking external aid must choose between decisions of the Australian and Canadian courts and the Privy Council on the one hand, and American decisions on the other. For assistance in finding answers to questions posed by constitutional restrictions on legislation like the fundamental rights, he is more likely to turn to American sources. The establishment of the Law Institute at Delhi and the excellent results of the Conference at Stanford must inevitably result in more law students from India going to America, and enhanced Indian interest in American law. More and more American cases will be cited and followed in the Indian courts, not only in cases presenting problems which are the peculiar concern of the American lawyer, but also in regard to matters on which equally apposite suggestions may be cited from the law of England. Among the subjects dealt with at the Stanford Conference, the administrative law problems, privileged official documents, judicial limitations on investigating commissions, contempt of court, and atomic energy are matters on which an English lawyer would have a contribution to make.

Is the English lawyer content to surrender the initiative to his American colleague? Is the Englishman satisfied that he stands to lose nothing if the Indian lawyer of the next generation looks to America for rules of law to govern new problems? Is it not time some effort was made to preserve what is still one of the strongest links still surviving between India and Britain? If we are content to boast that we gave India the rule of law, an efficient Civil Service, cabinet government, and the prerogative writs, we shall soon be as little remembered in India as the inventor of the wheel. That we have not the resources to compete with the Americans is obvious; that we should do nothing is less obvious. If we cannot establish a law institute in India, the cost of establishing a few scholarships in law for Indian students might be but a fraction of the pecuniary benefits indirectly resulting to us from their sojourn in this country. Surely we could follow and improve on what was done at Stanford, or is it impossible to raise the money to invite a few Indian jurists to come here for a period sufficiently long to examine, with some English colleagues, a series of topics agreed beforehand?

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[2] Paton, *The British Commonwealth; the Development of its Constitutions and Laws,* Vol. 2. *Australia,* pp. 71–76.

ALAN GLEDHILL.

THE SUPREME COURT IN THE INDIAN CONSTITUTION

SRI RAM SHARMA

JUDICIAL Review by the Supreme Court of the Acts of the Congress has often been subjected to severe criticism in the United States.[1] The Presidents, the States and the Congress have sniped at it from time to time. Students of constitutional practices as of constitutional law have subjected its work to a microscopic examination; they have discovered that it neither lives up to its profession nor to its reputation. It has been attacked as an undemocratic device for checking a full efflorescence of popular wisdom. Its need even in a federal government has been questioned.[2] Its work as a bulwark of fundamental rights lodged in a written constitution has been belittled.

But the Court has survived all onslaughts. Despite all that could be said against it, countries adopting new constitutions have set up similar institutions.[3] The only federation that till recently was pointed out as one example where such a function was not performed by a court has after all these years succumbed to the logic of events and lodged the power of judicial review of both cantonal and federal legislation in its Federal Court.[4] Justice Holmes' opinion, that the United States would not come to an end if the Court lost the power of declaring Acts of Congress void,[5] was given before the federal government had started moving into the state fields through its grants, bounties and plans. Its most trenchant foreign critic, Prof. Brogan, has now discovered that it does serve some purpose although an educative one.[6] Participants in two recent symposia on the place of the Supreme Court in the American polity generally agree in holding that it does perform some useful functions and should continue performing them.[7]

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[1] *Cf.* Bryce, *The American Commonwealth*; Brogan, *The American Political System*; Crosskey, *Politics and the Constitution in the History of the United States*; Corwin, *Court over Constitution*; Swisher, *The Growth of Constitutional Power in the United States*; Beard, *The Republic*, pp. 223–241; Hughes, *The Supreme Court of the United States*.

[2] Brogan, *An Introduction to American Politics*, p. 36.

[3] *Cf.* Lewenstem, *Constitutionalism and Constitutional Trends since World War II.*

[4] Hughes, *Federal Constitution of Switzerland*, p. 123.

[5] Holmes, *Collected Legal Papers*, pp. 295–296.

[6] Brogan, *Introduction to American Politics*, p. 415.

[7] Cahn (Editor), *Supreme Court and Supreme Law*; Southerland (Editor), *Government Under Law*.

The Supreme Court's exercise of its power of judicial review has been sometimes attacked and defended on the same grounds. Whereas one group of writers finds it performing a very useful service in adopting a document written in the eighteenth century to the needs and problems of an ever evolving if not ever changing United States,[8] another would condemn it for its finding in the Constitution a grant of power today which it has denied the day before yesterday if not yesterday.[9] The very concise if not cryptic nature of the American Constitution and the difficulty if not the impossibility of amending it have formed a standing temptation to the Court to add its own contribution to the American polity and to discover powers, immunities, instrumentalities and ancillary authority which were not always easily found in the Constitution. Once imported in the Constitution, the court was reluctant to declare them either redundant or obnoxious. But it redounds to the credit of the Court that it has not usually been too slow in reading out of the Constitution authority which it has read into it.

Some writers are beginning to feel that in the technological age which we are entering, a written Constitution and a court with power to declare even the Acts of the national legislature unconstitutional where they offend against its provisions may probably form a more effective guard for the preservation of the worth of the individual to the State against the attacks both of technocrats and administrators.

In discharging its function of judicial review of legislation, it must be admitted, the Supreme Court forms " a deliberate check upon democracy through an organ of government not subject to popular will." But " the judges of the Supreme Court are, in a sense, the embodiment of the reason of the body politic empowered to act as the guardians and final interpreters of the fundamental laws, by the original and supreme will of the people which created them." [10] As such, it has been said, judicial review involves an appeal to reason against will, an appeal to the people sober from the people drunk When the Court holds an Act unconstitutional, it may place no more than a temporary check on the legislature. But it may provide a cooling-off period when second thoughts may have time to take the field. In doing so, it asserts that the rule of majority is itself subject to law. It is only when the majority presumes to offend against the higher law, the Constitution, that the Supreme Court bars its way. But its danger signal may block only one of the ways of achieving the legislative end if it be constitutional. The legislature may try to get round the constitutional objection, though it may not always succeed. If the end be not constitutional at the time the Court gave its verdict, a constitutional amendment may try to provide the proper setting for achieving the end in view. But whereas the Court may not rule out a legislative policy for all times, it may kill an " obnoxious " measure for the time being. Its vigorous though judicious onslaught on the policy embodied in an Act may make its adoption impossible.

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[8] *Cf. Government Under Law.*

[9] *Cf. Government Under Law.*

[10] *Supreme Court and the Supreme Law*, p. 81; Rottschaefer, *Handbook of American Constitutional Law*, p. 34; *cf.* Curtis, *Lions under the Throne*; Freund, *On Understanding the Supreme Court*; Fairman, *American Constitutional Decisions.*

The Supreme Court in India has been functioning for eight years now. This may be a short period by which to judge any institution. But unlike the Supreme Court in the United States, the Supreme Court in India started functioning with judicial review securely thrust upon it. This period was more likely to reveal serious conflicts between the government and the judiciary than any other period in the life of the two, the Court and the Government. India's rulers are new to the job and having been so long in opposition bring a burning zeal and enthusiasm to its discharge. The judges were, however, bred in the old tradition of the judiciary and could be naturally expected to look askance on persons in high places. Few of the judges have been avowed Congressmen. They do not possess the civil servants' compelling virtue of faithfulness to the powers that be. They did not need the self-effacement which a civil servant was expected to practise.

It is surprising to find that these eight years have provided only a few occasions of serious clash. It is true the Supreme Court has thwarted occasionally the policy which a State Government or the Central Government had very enthusiastically espoused. We should, however, make a distinction here between the attempt of the Supreme Court to impose a rule of law on the administration and its declaring government legislation or administrative action invalid otherwise.

Here, at the outset, let us emphasise the fact that it was with the coming into force of the Constitution in 1950 that it was proclaimed aloud for the first time that the law applies to the government as well as to the governed. It is not surprising, therefore, that in order to impose the rule of law, the Supreme Court had to cast its net far and wide. If in Madhya Pradesh it restrained a District Magistrate from preventing labour from seeking employment in the manufacture of Bidis during the agricultural season,[11] it rebuked the Government of Madras when it tried to compel the cinema licensees to exhibit not less than 2,000 ft. of one or more approved

[11] *Chintaman Rao* v. *The State of Madhya Pradesh*, 1950 S.C.R. 759.

films at every show.[12] It told the Government of U.P. that it could neither extend the time for making an industrial award nor specify a fresh period of time.[13] It similarly prevented it from taxing forward contracts as sales.[14] It brushed aside the claim of the same government to prohibit dealings in futures and option in the commodities other than food grains under the U.P. Food Grains Order.[15]

It dealt equally strongly with legislation passed in Hyderabad settling a dispute about succession between private persons by legislation rather than by recourse to the law courts[16] and Bihar legislation which tried to settle alleged agitation in a locality by taking away land previously held lawfully by a citizen.[17] Where specified public officials had been empowered to deal with matters in their discretion, the Supreme Court insisted that they exercise their own discretion rather than decide cases in pursuance of government policy conveyed to them in writing or otherwise.[18] It prevented the Court of Wards, Ajmer, from taking over estate of a landlord who was, in their opinion, not habitually fair in his dealing with the tenants.[19] It censured the arbitrary Act of the Government of Assam in cancelling the lease of fisheries recommended by the Local Deputy Commissioner and approved by the State,[20] thus foiling its attempt at playing the part of a " brave, bold despot which knows no law."[21] If in Mysore, it could not reaward a contract for selling liquor for the year 1953-54 to the original allottee to whom it had been validly granted because the appeal reached it only a fortnight before the contract for the year was about to expire,[22] it did make a declaration that the contract had been validly assigned to him. It held the Government of Bihar to the terms of its agreement with an electric undertaking and allowed the Gaya Electric Undertaking to have its right adjudicated in the courts.[23] It examined the U.P. Coal Order 1953 and found unreasonable the power granted to the Coal Controller to issue licences for stocking, selling, storing, disposing or utilising coal as he had been given absolute power to grant, renew, refuse, suspend, revoke, cancel or modify a licence.[24] It similarly struck down the right of the Food Grain Authority in Rajasthan to acquire food stocks at any price.[25] It prevented the Government of Rajasthan from enforcing an Ordinance of the United States of Rajasthan vesting the right of collecting the revenue in jagirs in the State in areas which had formerly formed the United States of Rajasthan. The Ordinance did not apply to all the territories which were included in the State of Rajasthan earlier.[26]

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[12] *R. M. Seshadri* v. *District Magistrate, Tanjore,* 1955 1 S.C.R. 686.

[13] *Strawboard Manufacturing Co., Ltd.* v. *Gutta Mill Workers' Union,* 1953 S.C.R. 439.

[14] *Sales Tax Officer, Pilibhit* v. *Budh Pradash Jai Prakash,* 1955 1 S.C.R. 243.

[15] *Chamber of Commerce Hapur and Three Others* v. *State of U.P.,* 1955 1 S.C.R. 838.

[16] *Ameerunnissa Begum and Others* v. *Mahaboob Begum and Others,* 1953 S.C.R. 404.

[17] *Ram Prasad Narayan Sahi and Another* v. *The State of Bihar and Others,* 1953 S.C.R. 1129.

[18] *State of Bombay* v. *Purshottam Jog Naik,* 1952 S.C.R. 676.

[19] *Thakur Raghbir Singh* v. *The Court of Wards, Ajmer, and Another,* 1954 S.C.R. 1049.

[20] *State of Assam* v. *Keshab Prasad Singh and Another,* 1953 S.C.R. 865.

[21] *Ibid.* at 876.

[22] *K. N. Guruswamy* v. *The State of Mysore,* 1955 1 S.C.R. 305.

[23] *Gaya Electric Supply Co., Ltd.* v. *The State of Bihar,* 1953 S.C.R. 572.

When the Government of the U.P. was found to have placed in 1957 the management of Lallamal Hardeodas Cotton Mill under a Controller nominated by it and working under the general supervision of the Local District Magistrate, the Supreme Court held that the order became void as soon as the Constitution came into force on January 26, 1950.[27]

Even when the President threw his protective mantle over the Madras Electricity Supply Undertaking (Acquisition Act), 1949, certifying that its constitutionality could not be called into question even if it infringed the rights guaranteed under clause (2) of article 32 of the Constitution or limits placed on governmental authority by section 299 (2) of the Government of India Act, 1935, the Supreme Court struck down the Act as beyond the competence of the Madras legislature as defined in other provisions of the Government of India Act, 1935.[28] It held illegal the right claimed by the Government of Madras—or for that matter that by any other government—to interfere with the free circulation of a newspaper.[29] It disallowed precensorship of newspapers.[30] It struck at the right claimed by the Madras Government to declare associations unlawful without giving them any reasonable chance to contest such an order.[31] It insisted on keeping the Bengal Government to its agreement with the landlords in the matter of sale of land for non-payment of land revenue and permitted it to do so only after the date specified in the agreements and not as laid down unilaterally by the Board of Revenue.[32] It released a prisoner taken from Bombay to Lucknow to be produced before the Speaker of the U.P. Legislative Assembly when he was not produced before a magistrate within 24 hours.[33] It granted the habeas corpus petition of Ram Singh and others in Delhi when they were kept in jail without being properly remanded to jail by the magistrate.[34]

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[24] *Messrs. Dwarka Prasad Laxmi Narain* v. *State of U.P.*, 1954 S.C.R. 803.
[25] *State of Rajasthan* v. *Nath Mal*, 1954 S.C.R. 982.
[26] *State of Rajasthan* v. *Roa Manohar Singhji*, 1954 S.C.R. 996
[27] *Shanti Sarup* v. *Union of India A.I.R.*, 1955 S.C. 624.
[28] *R.E.S. Corporation* v. *State of Andhra*, 1954 S.C.R. 251.
[29] *Ramesh Thapper* v. *The State of Delhi*, 1950 S.C.R. 594.
[30] *Brij Bhushan and Another* v. *The State of Delhi*, 1950 S.C.R. 905.
[31] *State of Madras* v. *V. G. Rao*, 1952 S.C.R. 597.
[32] *Kali Ram Dokania* v. *Ulfat Hossain*, A.I.R. 1951 S.C. 1.
[33] *Gunupati Keshavaram* v. *Nafisul Hasan*, A.I.R. 1954 S.C. 636.

It held illegal the delegation by the Chief Commissioner, Ajmer, of the authority vested in him to make rules for holding fairs.[35] It resisted the attempt of the Government of U.P. to resume the lands granted to a citizen in 1948 by its then ruler.[36] It prevented the illegal seizure of goods by police officers in Himachal Pradesh at the instance of the Government of Jammu and Kashmir without authority of law.[37] It restored to the Government of Bengal the right to levy sales tax on goods bought by the Department of Industries and Supplies which it had earlier surrendered in favour of the Indian Stores Department or the Supply Department, as the scope and volume of the work entrusted to the new Department was much wider and larger than that of the Departments which the Ministry had replaced.[38]

No authority was too small for the Supreme Court's intervention. When the Town Area Committee of Jalalabad levied an unreasonable fee equivalent to a tax, it held it illegal.[39] It prevented the Municipal Board, Kairana, from setting up a Municipal Market where alone vegetables were to be sold whereas the by-laws laid down that vegetables could be sold only in a licensed place. The municipality had made no by-laws for licensing markets.[40] It held that the Industrial Disputes Acts applied to municipal workers including head clerks and sanitary inspector.[41] It restrained a municipal board from removing its secretary before the lapse of a month of the notice period.[42] It challenged the action of the Government of Madras under the Village Panchayat Act.[43] It held that an accused from another State could not be tried by a Panchayat under the U.P. Gram Panchayats Acts, 1947.[44] It prevented the Central Board of Revenue from transferring the assessment proceeding of a corporation to a place obviously inconvenient to it.[45] It awarded the arrears of salary to the heirs and legal representatives of the Secretary District Board, Shahjahanpur who had been wrongfully suspended pending the decision of his appeal against order of dismissal.[46] It defined the valid criminal procedure both in investigation of cases as well as in deciding cases.[47]

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[34] *Ram Singh* v. *The State of Delhi and Another*, 1951 S.C.R. 451.

[35] *Captain Ganapati Singhji* v. *The State of Ajmer and Another*, 1955 S.C.R. 1065.

[36] *Raja Surya Pal Singh* v. *The State of U.P. and Another*, 1952 S.C.R. 1056.

[37] *Wazir Chand* v. *The State of Himachal Pradesh*, 1955 1 S.C.R. 408.

[38] *Union of India* v. *Commercial Tax Officer*, A.I.R. 1956 S.C. 206.

[39] *Mohammad Yasin* v. *The Town Area Committee Jalalabad and Another*, 1952 S.C.R. 572.

[40] *Rashid Ahmed* v. *Municipal Board, Kairana*, 1950 S.C.R. 566.

[41] *D. N. Banerji* v. *P. R. Mukherjee*, 1953 S.C.R. 302.

[42] *Shrimati Hira Devi* v. *District Board, Shahjahanpur*, 1952 S.C.R. 1122.

[43] *Pundukudi Ramunii Kurup* v. *Panahayat Board Bodagora*, A.I.R. 1954 Mad. 754.

[44] *Bhim Sen* v. *The State of U.P.*, 1955 1 S.C.R. 1444.

[45] *Bidi Supply Co.* v. *The Union of India and Others*, 1956 S.C.R. 267.

. These were merely matters of keeping the Government straight. The court emphasised the principle that no organ of State may render an individual decision which did not conform to a general rule previously stated. Even though most of its orders concerning administrative matters were passed by the Supreme Court reversing the decisions of the lower courts, tribunals or authorities, it may be argued that a part of this work may have been done by a lower court. So far as orders involving the constitutionality of Acts were concerned it is obvious that they lie entirely within the sphere of the Supreme Court.

The clash between the Supreme Court and the Central or State Governments during this period centred around about half a dozen important problems. Herein, the policy of the Government rather than the execution of its laws was concerned. Two of these cases arose in Bombay: one concerning prohibition, the other concerning the educational policy of the Government. The Bombay Prohibition Act survived the scrutiny of the Supreme Court so far as the classes to whom the Act was not to apply were concerned. It ruled however that in prohibiting the possession of medicinal preparations or toilet articles containing alcohol, the legislature had stepped beyond its proper sphere. Possession of such toilet articles or medicinal preparations could under no circumstances be made criminal.[48] The prohibition policy was not indicted but the zeal and enthusiasm of the Bombay Government which had made it attack medicinal preparations and toilet articles were curbed. This, however, turned out to be a Pyrrhic victory. The use of medicinal preparations had not been prohibited. In *Behram Khurshed Pesikaka* v. *State of Bombay*, the Supreme Court placed the burden of proving that a suspected person had consumed prohibited liquor rather than permissible medicinal preparation squarely on the shoulders of the prosecution.[49] This certainly made the successful prosecution in cases involving taking prohibited drinks more difficult.

The Bombay Government was sharply brought up against the hard realities of the Constitution in another matter of policy. It decided to make the regional languages the media of instruction in its schools. There was nothing new in it. It was rather late in its field. Elsewhere, however, English had sometimes been continued as the medium of instruction securing the adoption of regional language

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[46] *Shrimati Hira Devi* v. *District Board, Shahjahanpur*, 1952 S.C.R. 1122.
[47] *H. N. Rishbud and Inder Singh* v. *State of Delhi*, 1955 1 S.C.R. 1150.
[48] *State of Bombay* v. *F. N. Bulsara*, 1951 S.C.R. 682.
[49] *Behram Khurshed Pesikaka* v. *The State of Bombay*, 1955 1 S.C.R. 613.

[illegible] polit. prop^n. see Public Law 1961
"Cultural Rights of Indian minorities"

apparently by voluntary action. Bombay tried to make up for its being late in the field by adopting a more comprehensive and stringent policy. It laid down that, to be eligible for grants, schools except those teaching children whose mother tongue was English, *e.g.*, Anglo-Indians, must not teach their students through the medium of English. This brought its policy into conflict with the requirements of the Constitution. The Bombay Government demanded that none but those whose mother tongue was English should be taught through the medium of English. The Constitution however demanded that grants on a more liberal scale should be paid to the Anglo-Indian schools till 1960 only if they would admit children of other classes to their institutions. The Supreme Court held that the State Government could not prohibit a course of action which the Constitution approved. It struck down the Bombay circular by holding that however laudable its object of making regional languages the media of instruction in its schools, it could not differentiate between its citizens for reasons relating to difference in language alone.[50] It may be conceded here that the decision of the Supreme Court touched a very small fraction of the students intended to be covered by the new educational policy of the Bombay Government.

The attempt of the Governments of Madras, Bombay and Orissa to supervise and control the income from religious endowments and *Maths* was practically paralysed by the decisions of the Supreme Court characterising certain features of the impugned legislation as implying interference with the religious rights of citizens and others as interfering with the property rights of the Mahants. It found some of the provisions otherwise defective as taking away existing rights of citizens without affording proper opportunity for defending them.[51]

The Government of Madras was deservedly rebuked by the Supreme Court by its continuing to act as in the pre-Constitution days. Seats in its educational institutions had been divided by a government resolution between various communities. Posts in its public services were also similarly divided. On this being challenged in two separate actions, the Supreme Court found no difficulty in holding that such divisions, based on birth, were against the Constitution and therefore void.[52]

In a case involving the same question in U.P., some voters went to the Supreme Court after taking part in a municipal election where seats had been divided among communities. The Supreme Court pronounced such communal representation unconstitutional and void, though in the case in court it refused to grant any relief in the form which it had been asked for because the election was over.[53]

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[50] *State of Bombay* v. *Bombay Education Society*, 1955 1 S.C.R. 568.

[51] *Commissioner, Hindu Religious Endowments* v. *Laxmindra Tirth Swamiar*, 1954 S.C.R. 1005; *Ratilal Panchand Gandhi* v. *State of Bombay*, 1954 S.C.R. 1055; *Sri Jagannath* v. *State of Orissa*, 1954 S.C.R. 1046.

[52] *State of Madras* v. *Shrimati Chmpakam Dorirajan*, 1951 S.C.R. 225; *Venkataraman* v. *State of Madras*, A.I.R. 1951 S.C. 229.

The State of Bihar ran into trouble with regard to the implementation of its land policy. Its Land Reforms Act, 1950, sought to acquire arrears of rent and cesses. The Supreme Court held such acquisition neither in the public interest nor related to the objects of the legislation.[54] Holding these provisions of the Bihar Land Reforms Act " a piece of colourable legislation," the Court struck them down as unconstitutional, void and unenforceable.[55] Similarly it prevented the Government of Orissa from enforcing the provision of the Orissa Agricultural Income Tax (Amendment) Act, 1950, when, in the guise of a taxative provision, it sought to acquire agricultural land without paying compensation.[56]

The Government of Madhya Pradesh was compelled to honour the licenses to cut, gather and carry away produce of land in the shape of tendu leaves, lac, timber or wood granted by the proprietors of land which the State had acquired.[57]

In Uttar Pradesh the attempt of the State to nationalise road transport was made ineffective by the courts. The High Court of Allahabad held that the State could not do so by an executive order.[58] When the State passed the necessary legislation, the Supreme Court questioned whether it was in the public interest thus to interfere with the right of citizens to follow a profession or engage in a business or trade.[59] When an amendment of the Constitution removed the challenge to such legislation by permitting the State to nationalise industries, the Supreme Court held that this still left untouched the freedom of trade guaranteed to citizens and in any case it was a deprivation of property, for which the State must pay compensation.[60]

Several States were concerned in the decision of the Supreme Court with regard to taxes on sales or purchases made in the course of inter-State trade or commerce. A proviso to article 286, section 1, of the Constitution provided that sales would be deemed to take place in the State where goods were delivered for consumption in the State. The Supreme Court first held valid taxation by the State in which such goods were delivered for consumption.[61] Later, the Supreme Court held that no State could levy tax on goods sold in the course of inter-State trade or commerce.[62] This affected almost all the States which had started levying taxes on out-of-State transactions saved to them by first decision of Supreme Court.

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[53] *Nain Sukh Das and Another* v. *The State of Uttar Pradesh and Others,* 1953 S.C.R. 1148.

[54] *The State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darhbanga and Others,* 1952 S.C.R. 889.

[55] *Ibid.* 948.

[56] *K.C. Gajapti Narayan Deo* v. *State of Orissa,* 1954 S.C.R. 1.

[57] *Visweshwar Rao* v. *The State of Madhya Pradesh,* 1952 S.C.R. 1020.

[58] Appeals under article 132 (1) of the Constitution of India from the judgment and order, dated the November 17, 1953 of the High Court of Judicature at Allahabad. Civil Miscellaneous Case No. 414 of 1953.

[59] *Saghir Ahmed* v. *State of U.P.,* 1955 S.C.R. 707.

[60] *Ibid.* 730.

West Bengal, Saurashtra and Bombay were affected by the decision of the Supreme Court with regard to special courts. The draftsmen in all the three States had clothed their identical objectives in almost identical terms. Section (5) (1) of the West Bengal Special Courts Act was held *ultra vires* by reason of its provisions being in conflict with Article 14 of the Constitution. Among other things, it permitted the State government to refer any case to a special court created by it by a notification vesting in the court the right to try any case referred to it.[63] The Saurashtra State Public Safety Measures (Third Amendment) Ordinance of 1949 was saved because the notification issued under it had created courts for trying offences, classes of offences, or classes of cases, and not cases, even though authorised by the parent Act.[64] Similarly the Bombay Securities Measures Act of 1947 was held *ultra vires* and inoperative after the coming into force of the Constitution.[65] The Act authorised the State to set up courts under special judges to try any case referred to them.

The Union Government and most of the State Governments were affected by the decisions of the Supreme Court in connection with preventive detention. Here it may be asked whether any question of policy were involved at all. When first the Supreme Court insisted that the Court must have a copy of the grounds of detention furnished to the accused so that it could decide whether or not the right conferred on the detenue by other sections of the Act to rebut the grounds had been allowed to be exercised,[66] it was removing a clash discovered between the various clauses of the same Act. In specific cases, again, what the Supreme Court struck down was very often the carelessness of the officials framing the grounds or their delay in furnishing them.[67] That the Court had no intention of making difficult maintenance by the States of law and order was well illustrated by its holding legal the supplying of supplementary particulars.[68] It must however be conceded that its watchfulness for rights of citizens must have influenced the government policy in many more cases than those which came to the courts.

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[61] *State of Bombay* v. *United Motors*, 1953 S.C.R. 1069; *Himatalal Harilal Mehta* v. *The State of Madhya Pradesh*, 1954 S.C.R. 1122; *State of Travancore Cochin* v. *S.V. Cashew Nuts Factory*, 1954 S.C.R. 53.

[62] *Bengal Immunity Co., Ltd.* v. *State of Bihar and Others*, 1955 2 S.C.R. 603.

[63] *The State of West Bengal* v. *Anwar Ali Sarkar*, 1952 S.C.R. 284.

[64] *Kathi Raning Ravat* v. *The State of Saurashtra*, 1952 S.C.R. 435.

[65] *Lachhmandas Kevalaram Ahuja and Another* v. *The State of Bombay*, 1952 S.C.R. 710.

[66] *A. K. Gopalan* v. *State of Madras*, 1950 S.C.R. 88; *Dr. Ram Krishan Bharadwaj* v. *State of Delhi and Others*, 1953 S.C.R. 708.

[67] *Ujjar Singh* v. *State of Punjab*, 1952 S.C.R. 756.

The Court assumed early in its career control over tribunals of various types appointed by the State Government or by the Union Government. One need not take seriously the fact that when the first such case came to the Court the Union Government resisted the claim of the Supreme Court to the exercise of such authority.[69] More important, however, is the fact that the Supreme Court extended its jurisdiction to include acts of administrative authorities likely to affect subjects prejudicially if the authorising statute required the authority to act judicially.[70] It also held its door open to provide relief to citizens threatened with penal consequences if they did not comply with provisions of legislation which they alleged were unconstitutional, and this even though other remedies were open to them under the challenged legislation.[71]

A rather ticklish question arose when an order, purported to be made by an order of the Governor and signed by the Home Secretary, came before the Court. How was such an order to be proved? The Supreme Court did not dismiss the possibility of the relative Minister being asked to file an affidavit or called to court. Of course, the Secretary with requisite knowledge could file an affidavit and if his affidavit were believed, the Minister need not be called. But it held that a slip-shod verification saying that everything was true to the best of his information and belief might well, in a given case, lead to a rejection of the Secretary's affidavit.[72]

The decision of the Supreme Court kept out favouritism, nepotism and patronage in appointments to various services. The decisions of the Supreme Court seriously challenged the right of the Union and the State Government to take possession of or regulate the use of property.[73] The Constitution had to be amended thrice[74] to permit the Government to carry on the policy which it wanted to follow. It must be admitted that here again the Supreme Court struck down the incompatibility between the various provisions

[68] *State of Bombay* v. *Atmaram Shridhar Vaidya*, 1951 S.C.R. 167.

[69] *Bharat Bank Ltd.* v. *Employees of Bharat Bank Ltd.*, 1950 S.C.R. 459.

[70] *Province of Bombay* v. *K. S. Advani and Others*, 1950 S.C.R. 621.

[71] *State of Bombay* v. *United Motors*, 1953 S.C.R. 1069.

[72] *State of Bombay* v. *Parushottam Jog Naik*, 1952 S.C.R. 674.

[73] *State of West Bengal* v. *Subodh Gopal Boase and Others*, 1954 S.C.R. 587; *Commissioner Hindu Religious Endowments* v. *Laxmindra Tirth Swamiar*, 1954 S.C.R. 1005; *Dwarkadas Shrinivas of Bombay* v. *The Sholapur Spinning and Weaving Co., Ltd. and Others*, 1954 S.C.R. 672.

[74] The Constitution (First Amendment) Act, 1951; The Constitution (Fourth Amendment) Act, 1955; The Constitution (Seventh Amendment) Act, 1956.

of the Constitution and the impugned legislation going beyond the field allotted to it by the Constitution. The Government therein read, not an attack on its policy, but its failure to clothe its ideals in the formal and technical language, so as to form a part of the Constitution.

A serious obstruction to the policy of the Union Government was occasioned by the decision of the Supreme Court holding the Taxation of Income (Investigation Commission) Act, 1947, invalid after January 26, 1950.[75] It must be remembered, however, that the Commission was set up as a temporary emergency institution which should have been able to finish its work before the Constitution came into operation. The Act creating it had been framed on the assumption that the Government had information about almost all the cases where evasion of taxation on a large scale had taken place.[76]

Kartar Singh and others led a procession as a protest against the alleged policy of the Punjab Government to nationalise motor transport. The processionists uttered indecent, vulgar, and provocative slogans against the Chief Minister and the Minister of Transport, thought to be specially responsible for this policy. When the Punjab Government prosecuted them under the Punjab Security of the State Act, 1953, the Supreme Court on appeal by special leave held that, however reprehensible the conduct of the appellant might have been, prosecution under the Act could only succeed if it was established that it had offended against decency or morality. On the facts of the case, the Supreme Court held that this had not been established and acquitted the accused. It deprecated strongly the attempt of the State authorities to prosecute the accused under the Security of the State Act.[77]

Chief Justice Taft was once roused to declare that the Supreme Court of the U.S.A. was a blind court, failing to see what was visible to everyone else. The Indian Supreme Court has not yet developed any blind spots. The disease in the United States owed its origins to the courts writing *laisser-faire* into the Constitution while interpreting due process. The Indian judges have had no such temptation so far. The court was indeed invited to do so when land legislation in various States was attacked as not being in the public interest. It refused to swallow the bait even though, in one case at least, it was offered by the Chairman of the Drafting Committee of the Constituent Assembly arguing a case in court.

In India, as elsewhere, " a society has always within it seeds of dissension." But "it also has within it forces making for moderation and mutual accommodation." Prof. Hart would have us believe that "the courts" and possibly the Supreme Court particularly "have a significant contribution to make in pushing the American Society in the direction of moderation in combination with other forces."[78] The Supreme Court in India has certainly made a significant contribution towards pushing the Indian Society in the direction of moderation. It has, as occasion demanded, prevented "the intolerable sacrifice of decent and trustworthy modes on the altar of expediency"!

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[75] *Suraj Mal Mohta and Co.* v. *A. V. Visvanatha Sastri,* 1951 S.C.R. 448; *Shri Meenakshi Mills Ltd. Madurai* v. *Vishwanath Sastri and Another,* 1955 1 S.C.R. 787.

[76] Taxation on Income (Investigation Commission) Act, 1947.

[77] *Kartar Singh and Others* v. *The State of Punjab,* 1956 S.C.R. 476.

The Supreme Court in India has tried to make the spirit of law pervade throughout the governmental process. Herein it had its toughest assignment. It had to blow hard, if not hammer hard, at the despotism that stalked throughout the country. Most parts of "Princely India" had never really enjoyed the rule of law in any shape or form. In what had been British India till recently remnants of despotism flourished openly. Between August 15, 1947, and January 26, 1950, the attention of the country was mostly directed to the fashioning of a Constitution. The social *mores* were not always favourable to the rule of law. The new Government that came into power at the centre and in the popularly governed States had won power the hard way. The majority party was flushed with the pride of victory. Under the circumstances, the Supreme Court was almost the only effective instrument, barring the Constitution, for imposing a rule of law on the country. The Constitution and the Supreme Court between them have done a splendid job in infusing the spirit of constitutionalism in the country despite heavy odds. There has certainly been some straining at the restraints occasionally. Here the Court has had to resolve several tensions in the constitutional system, here confining a State Government to its governmental duties leaving administration to the administrators, there telling the administrators where they must get off the field not open to them, now telling the landlords that it was not in the public interest to perpetuate feudalistic conditions of landholding and again warning Governments that they could not, even with the help of legislative forms, usurp the functions of the judiciary. "The standards of what is fair and just" set by the Supreme Court have certainly "promoted the spirit of law throughout the government" and "helped shape the dominant civic habits and attitudes" "by releasing through their judgments contagious consequences."

As an analysis of the amendments to the Constitution has amply demonstrated, we are as yet in no danger of equating the unconstitutional with the undesirable or unjust. This may not strictly be tantamount to not equating the constitutional with the just or desirable. But the Supreme Court has contributed significantly to the second development as well. It has gone off the beaten track now and then, to think aloud and in such an unorthodox way proclaimed that the legal limits to a course of action need not be the only limit thereto. The Parliamentary form of India's Government allows the question hour in the legislatures to be used for ventilating grievances without making them always " stuff of law suits " and thus keeps alive the tradition that what is permitted by law need not always be in the public interest.

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[78] Hart, *Government Under Law*, p. 140.

India prides itself on being a welfare State. The Constitution which created the Supreme Court clothed the executive and the legislature—implicitly if not always explicitly—with power to run such a State. The Constitution specifically gives the Supreme Court the right of judicial supervision over all tribunals. The Constitution has thus explicitly rejected the thesis that all power is evil and that administrative tribunals may function independently and without judicial review. Naturally the Court has followed the Constitution in looking upon this controlled power as a necessary adjunct to the service of government and administration. It has, by its decisions and by reasons given in support of those decisions, enlarged the area to which the rule of law should be applicable. By asserting judicial control over Election Disputes Tribunals, the Supreme Court has secured that the process of creating the political power in the country functions regularly and in an orderly manner.

The Supreme Court has tried to protect the minorities, cultural, linguistic, and even territorial, in the exercise of the rights guaranteed to them within the framework of the Constitution, by carefully analysing the issues raised in cases before it. The fundamental rights of individuals and citizens in the Constitution luckily have not been granted absolutely. The Constitution itself provides that restrictions may be placed on several of them under specified conditions or to serve specified ends. The Court has, however, always proceeded on the assumption that it is the rights that are fundamental and not the restrictions. It has conceded that power may be necessary to clothe these rights with vitality, if they are to be enjoyed by the community at large.

Judicial review of legislation, it has been claimed, makes it possible to adapt the Constitution to the varying needs of the day. This may involve reversing earlier decisions of the Court. Where amendment of the Constitution is difficult, this function may be claimed to be performed by the Court to some purpose. Students of jurisprudence and constitutional law are sometimes distressed over the combination of paying lip service to the principle of *stare decisis* with the power of reversing decisions, as exercised in the United States and India. The Australian court frankly reverses earlier decisions when they do not seem to suit the circumstances. The Indian adoption of the American insistence on having the best of both worlds has been no more successful than its American model. It may of course be objected that the Australian practice may sometimes be as much, if not more, objectionable. It knocks the bottom out of the entire case for judicial review when, as in the Engineers' case, the Australian High Court reversed an earlier decision, and conceded that the federal government could exercise a power which the electorate had denied to it a little earlier in its attempt to amend the Constitution. Under such circumstances, the Court cannot claim to represent the reason of the polity as against its will. It no longer represents a check, deliberate or otherwise, upon democracy, nor does it provide an appeal from the people drunk to the people sober It is difficult to argue that the lip service paid to precedents, in the guise of distinguishing one case from another, is always of much help or guidance to those who find a new version of law applicable to them, on grounds which they learn after hearing the decision in their case announced.

The study of the cases decided by the Supreme Court leaves one very often in no doubt that it was failure of either the lawyers in courts below or in the Supreme Court itself which led to a subsequent change in the decision of the Court. The detailed provisions of our Constitution do not at present need to be interpreted away. It is hoped that as lawyers learn their business better and as the Court gives up relying on the idle formula, "assuming, without deciding," the Court would be able to strike a new line for itself and interpret the Constitution as it stands.

A study of the judgments of the Court would demonstrate that most of them are inspired with a desire to secure that injustice is neither perpetrated nor perpetuated. In securing that justice is done, the Supreme Court is usually able to cut through technicalities, however time honoured. It has made, however, no attempt at substituting its own view of a matter for that of the legislature whose handiwork it may have been examining. As a Court it is not concerned with the wisdom or the expediency of the law it is examining. However, it has allowed itself the luxury of asides and off-the-record comments, in which most courts of such high status do not usually indulge. However irritating some of these remarks may be to some professional lawyers, the legislative and administrative record for the past eight years amply bears out the useful purpose they have served. They have never interfered with the impartial interpretation by the court of the law in the case in court, yet very often they have found their target in some administrative or legislative shortcoming.

The Supreme Court may occasionally reshape an Act so as to make it conform to the provisions of the Constitution. This may involve putting a " shall " where there was originally only a " may " in the legislation. On other occasions it may cut out part of an Act, because it is void and hence dead and of no effect. Notwithstanding all this, the justices may well believe that amending Acts of the legislature is no part of their functions. This protestation may save them from being looked upon as rivals by the legislatures in their most important function: making, unmaking, or amending of laws.

Normally the executive and the legislatures have been content to follow where the courts have led. But Parliament has occasionally felt it necessary to amend the Constitution so as to make Parliament perform, to the satisfaction of the Court, a function which Parliament may have earlier considered the Constitution allowed it to perform.

Through its judicial control of inferior courts the Supreme Court has laid down what it would consider a fair trial and a fair investigation in a criminal case, thus influencing the ways these things may be done to its satisfaction.

In an American seminar on government under law, a federal judge was asked, " what part, if any, do public opinion and public clamour, whipped up by the press out of all proportion to the issues involved, play in arriving at your and your associates' almost always calm and well-reasoned opinion? What part does the atmosphere of the general community play? " Judge Hastie's answer was very illuminating. " As little part as judges, being human beings, can let it play. We like to believe that it plays almost no part. That certainly is our goal."[79] The restraint on the press and the public with regard to cases under trial is much more rigorous here than in the United States. If the judges of the Supreme Court were asked the same question, one is sure they would be able to assure their interrogator of their serenity, impartiality and clear-headedness.

If the published opinions of the Court can serve as a pointer, some judges seem to have developed the knack of converting their colleagues to their own point of view. It is good that outsiders have no access to the conferences that the judges hold in coming to a decision. Otherwise what would one not have heard? Or are the justices less pungent in their conferences than in their written judgments?

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[79] Hastie, *Government Under Law*, p. 360.

THE SENATE OF NORTHERN IRELAND

A. G. DONALDSON

THE Senate of Northern Ireland had a most unpromising origin. The indirect descendent of different bicameral proposals in the various Home Rule measures, the Upper House of the Northern Ireland Parliament came into being despite the expressed apathy of those who in 1920 represented Northern Ireland at Westminster. Yet it still functions as part of Northern Ireland's Constitution and contributes a share to the working of parliamentary government there. This article outlines the historical background, describes the Senate's composition and powers, analyses some characteristics of the Senators and of their work, and summarises some of the views which have been expressed about the Senate.

BICAMERAL PROPOSALS IN THE HOME RULE MEASURES

Under the first Home Rule Bill which Gladstone introduced in 1886 there would have been constituted an " Irish Legislative Body," consisting of two " orders " who were to sit together but to vote separately on legislation and on procedural matters. The " first order " was to have twenty-eight peerage members (the Irish representative peers) and seventy-five elected members. The latter were to have a property qualification and were to be chosen on a limited franchise; they would have held office for ten years, unaffected by a dissolution, with half the members retiring every fifth year. This proposal was made to protect minorities and to produce " stable and consistent legislation." But objection was taken to the " fancy franchise," doubt was cast on the efficacy of the protection for minorities, and fears of obstruction were expressed.[1]

Similar arguments were put forward when, seven years after the first Home Rule Bill was refused a second reading, Gladstone introduced his second measure " to amend the provision for the Government of Ireland." Under the 1893 Home Rule Bill the Upper House of the proposed Irish legislature was to be an Irish Legislative

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* The writer wishes to stress that this article was written in his personal capacity, not his official one of Second Parliamentary Draftsman to the Government of Northern Ireland. He also wishes to acknowledge the help given by the Northern Ireland Clerk of the Parliaments and the Librarian of the Northern Ireland Parliament, and their respective staffs. None of these officials is, however, in any way responsible for any statement appearing in this article.

[1] *Cf.* Parl. Deb. 3s, Vol. 304, cols. 1065–1067, 1133, 1320; Vol. 305, col. 618; Vol. 306, cols. 58, 1172.

Council with forty-eight members, directly elected on a limited franchise and holding office for a fixed term of eight years, with half retiring every four years. Disputes between the Council and the Lower House (the Irish Legislative Assembly) were to be settled by means of a joint session, to be held after a dissolution on a two-year period. During the debates Gladstone expressed himself against a nominated second chamber, while Bryce revealed that the Government would have preferred a popularly elected Legislative Council, but thought that the Opposition would insist on some protection for property interests.[2] However, the rejection of the 1893 Bill by the Lords rendered the matter academic for almost two decades.

When the third Government of Ireland Bill was introduced in 1912, nomination by the Lord Lieutenant of Ireland was proposed for an Irish Senate, to consist of forty members holding office for eight years, with ten retiring every second year. (The then recently constituted South African Senate was used as a precedent for the Irish body's delaying powers and limited power of dealing with financial measures.) Nomination was defended as a means of obtaining representatives of minorities which might not be represented by popular election. During the debates proposals were made for the abolition of the Senate, and for forming it from *ex officio* county and borough representatives. But as the Bill emerged from the Commons the first Senate was to be nominated for a five-year period, while subsequent Senates were to be elected for the same period by the four Provinces of Ireland, using the popular franchise and proportional representation.[3] The proposal remained in this form in the Bills rejected by the Lords in 1913 and 1914, and in the Government of Ireland Act, 1914,[4] which was fated never to come into operation.

The next chapter in the history of Irish bicameralism was written by the Irish Convention, a body of almost a hundred members officially constituted in 1917, and representative of practically every shade of Irish opinion. A majority of the members (but not the Ulster Unionist representatives) were agreed on the composition of an Irish Senate of sixty-four members, some *ex officio*, some elected to represent various groups and interests, and some nominated by the Lord Lieutenant. The powers of the proposed body were to be those of the Irish Senate under the Act of 1914, with the addition (on the Australian precedent) of a power to suggest amendments to money Bills.[5] The Convention's report was relied on during the debates on the Government of Ireland Bill, 1920, but otherwise it was, like the previous bicameral proposals, doomed to oblivion.

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[2] *Cf*. Parl. Deb. 4s, Vol. 8, cols. 1255–1256 (Gladstone), 1282, 1320–1321, 1407, 1432 (Bryce), 1478, 1654, 1739; Vol. 11, cols. 358, 586.

[3] *Cf*. H.C. Deb. 5s, Vol. 36, cols. 1413, 1427, 1448, 1454; Vol. 39, cols. 474–515, 591–702; Vol. 46, cols. 1023–1058.

[4] 4 & 5 Geo. 5, c. 90.

[5] *Report of the Proceedings of the Irish Convention* (1918, Cmd. 9019), p. 26.

. Not surprisingly, when the fourth Home Rule Bill was introduced in 1920 the subordinate parliaments proposed for Northern Ireland and Southern Ireland were to be unicameral. During the debates it was suggested that there should be a single Irish Senate for both subordinate parliaments, but this proposal for a legislative overlord was rejected. Next, a proposal that there should be separate Senates for Northern and Southern Ireland, partly elected and partly nominated, was withdrawn when the Government agreed to the bicameral principle. But the task of constructing the second chambers proved so difficult that it was placed on the Council of Ireland, a body which was to represent the two new legislatures.[6] In the Lords, amendments specifically provided for the composition of the new Senates. That for Southern Ireland was to consist of sixty-four *ex officio,* nominated and elected members on the lines of the Irish Convention report, and that for Northern Ireland was to consist of two *ex officio* members—the Lord Mayor of Belfast and the Mayor of Londonderry—and twenty-four members elected by the Northern Ireland House of Commons. It was emphasised that the Senate of Northern Ireland was introduced only to counterbalance that provided for the protection of minorities in Southern Ireland.[7] Indeed, an Ulster peer said: "I wish to say a word with regard to Northern Ireland. We are most indebted to the noble Lord for the trouble he has taken; we thoroughly appreciate his efforts, but we do not pay the slightest attention to them."[8]

When the Bill was sent back to the Commons Sir Edward Carson (as he then was) reiterated the Ulster Unionist view of the Northern Ireland Senate when he said "We take no responsibility for it. We did not ask for it, and we do not want it." An Irish Nationalist protested that the Senate would afford no protection for minorities, since Nationalist representation in the Senate would be small. Later, one of the Ulster Unionist M.P.s moved an amendment providing that half the Senate should retire every four years, with the aim of avoiding the criticism that the Senate would be an exact replica of the Commons.[9]

In sum, the origin of the Northern Ireland Senate was inauspicious.

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[6] *Cf.* 129 H.C. Deb. 5s, cols. 150–202, 1259–1283; 134 H.L. Deb. cols. 905–941.

[7] *Cf.* H.L. Deb. 5s, Vol. 42, cols. 817–841, 850–866, 924–927, 941–946, 1124–1134; Vol. 43, cols. 28–41, 58–59.

[8] 42 H.L. Deb. 5s, col. 1131, Lord Oranmore and Brown stated (*ibid.*, col. 1133) that he had had support from "certain Ulster sources" but he did not specify these. The original statement was ironical, for the speaker—the Duke of Abercorn—sat for a short time in the Northern Ireland Senate before becoming the first Governor of Northern Ireland.

[9] *Cf.* 136 H.C. Deb. 5s, cols. 781–785, 826–830, 861–891.

Introduced as a make-weight in the Lords, its acceptance by the Ulster Unionist representatives was, to say the least, unenthusiastic. The paradox of the situation was heightened by the fact that the Senate of Southern Ireland met on only two occasions and then adjourned *sine die,* passing into the limbo of Irish constitutional history.[10] By contrast, the unwanted Northern Ireland Senate has survived for thirty-seven years and is still functioning.

THE COMPOSITION OF THE SENATE

The survivor of the various essays in Irish bicameralism is half the size of the Northern Ireland House of Commons (which has fifty-two members) and is, save for the two *ex officio* members, chosen by it. There is no property qualification for either Senators or M.P.s but both are, by section 18 (2) of the Government of Ireland Act, 1920,[11] subject to the current law on disqualification for membership of the United Kingdom House of Commons.[12] Section 18 (3) of the Act of 1920 allowed peers to become either Senators or M.P.s, and the succeeding subsection disqualified members of either Northern Ireland House for membership of the other. The Fourth Schedule to the Act of 1920 fixed the term of office of elected Senators at eight years (unaffected by any dissolution), with twelve Senators retiring every four years. It also provided that where a casual vacancy occurs the person elected to fill it must retire at the end of his predecessor's term. A Senator may, under section 18 (5) of the Act of 1920 and Standing Order XXXV (1), resign by giving notice in writing to the Speaker.

The Election of Senators (Northern Ireland) Order, 1921,[13] made under Art. 1 of the Fourth Schedule to the Act of 1920, provided for the issuing of writs and the holding of Senate elections. Writs are issued by the Governor of Northern Ireland (as successor to the Lord Lieutenant of Ireland) and the Speaker of the Lower House acts as returning officer. In accordance with Art. 4 of the Fourth Schedule, where there are four or more vacancies the " one transferable vote " system of proportional representation is used, and the Irish Senates (Proportional Representation) Order, 1921,[14] set out in detail, with a lengthy example, the working of this system. Where there are less than four vacancies, an elector may give one vote to each candidate (not exceeding the number to be elected) and any tie is decided by the drawing of lots by the Speaker of the Commons. Art. 3 of the Election of Senators Order gave the House of Commons, or in default, their Speaker, power to make regulations or directions governing the conduct of Senate elections. In practice, the Speaker's regulations are used for this purpose, and regulation 14 provides that any question as to the validity of an election or of a Speaker's decision shall be determined by the House of Commons "or in such manner as that House may direct." As a result of a delay in delivering some ballot papers by post the 1925 Senate election was challenged in the Commons, but the demand for a recount was rejected on a division.[15] This was the only time that a move was made to exercise the control of the Commons over elections to the Upper House.

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[10] For a detailed discussion of bicameralism under the 1922 Irish Free State Constitution, see D. O'Sullivan, *The Irish Free State and its Senate* (1940). For discussion of the present Irish Senate, see A. W. and M. W. Bromage, " The Vocational Senate in Ireland " (1940) 24 *American Political Science Review,* 519; F. B. Chubb, " Vocational Representation and the Irish Senate " (1954) 2 *Political Studies,* 97; 164 *Dail Eireann Debates,* cols. 835–849, 1131–1157, 1453–1457.

[11] 10 & 11 Geo. 5, c. 67.

[12] *Cf.* House of Commons Disqualification Act, 1957 (5 & 6 Eliz. 2, c. 20), s. 10 and Third Schedule.

[13] S.R. & O. 1921 No. 729.

[14] S.R. & O. 1921 No. 727.

In all, ten Senate general elections have been held. At the first, in 1921, and the most recent, in 1957, there was no contest. The first of the regular four-yearly elections was held in 1925, when the twelve members due for retirement were chosen by lot. The number of candidates at these elections has varied between thirteen and eighteen. In addition, there have been fifty-two by-elections, but the number of vacancies has never been sufficient to justify the use of proportional representation. The smallness of the electorate, the fact that the political affiliations of M.P.s are well known, and the ease with which the course of the voting may usually be predicted—all these factors combine to reduce or even eliminate the element of uncertainty which usually attends an election by proportional representation. In the result, an aspiring Senator who secures the votes of four M.P.s can be sure of securing a seat at a Senate general election, though an overall majority is necessary at a by-election for a single vacancy.

For those who do secure election, and for the *ex officio* Senators, there is an annual allowance of £400, with an expenses allowance of £2 5s. for each day of attendance at the Senate or a Committee. These rates were fixed in 1955,[16] replacing a system of expenses payments plus an annual allowance for Senators who signed a declaration of the inadequacy of their income. The 1955 scheme provided one of the few examples of public interest in the Senate's activities.[17]

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[15] 6 H.C. Deb. (N.I.) cols. 1003–1005, 1013–1047; 186 H.C. Deb. 5s, col. 2235.

[16] 39 H.C. Deb. (N.I.) cols. 2901–2904.

[17] "To put the matter bluntly, our Senators as a whole are not worth £400 per year plus expenses. As a body, they are much less important than the Commons. They do a great deal less work, they do not have to fight for their seats, they

THE SENATE'S POWERS

The Act of 1920 contains no declaration similar to that in section 53 of the Australian Constitution,[18] generally equating the powers of the Australian Senate with those of the House of Representatives, nor has the Senate of Northern Ireland power to suggest to the House of Commons amendments or modifications which it cannot itself make. But in other respects the limitations on the powers of the Northern Ireland Senate are similar to those on the powers of the Australian Chamber. There is an even closer comparison with the powers of the South African Senate, for sections 60 and 61 of the South Africa Act, 1909,[19] were reproduced almost verbatim in the Act of 1920. Thus, under section 16 (1) of the Act of 1920 taxation or appropriation Bills may originate only in the Commons, though provisions relating to fines, penalties, and fees do not *per se* bring a Bill within these categories. By section 16 (3) the Senate is prohibited from amending any Bills so far as they impose taxation or appropriate revenue or moneys, and in addition the Senate may not amend any Bill "so as to increase any proposed charges or burdens on the people." "Tacking" is prohibited by section 16 (4), under which appropriation Bills may not deal with any other subject. As will be seen, the interpretation of these provisions has been the subject of a recent Senatorial protest.

In the matter of delaying powers the Northern Ireland Senate also resembles that of South Africa, as appears from a comparison of section 63 of the South Africa Act with section 17 of the Act of 1920. The Governor of Northern Ireland may convene a joint sitting of the two Houses where the Senate reject or fail to pass a Bill passed by the Commons, or the Commons disagree with amendments made by the Senate, and, in the following session, either of these events recur in relation to that Bill. Where the Bill is an appropriation or taxation measure, the joint sitting may be held in the session during which the dispute arises. Section 17 (2) provides that at a joint sitting the Bill as it left the Commons, and any disputed amendments, are to be debated, and the decision of the majority is to prevail. The subordinate position of the Senate in the Parliament of Northern Ireland is shown by the fact that a joint sitting cannot be held because of a dispute about a Bill introduced in the Senate.

The Act of 1920 differs from the South Africa Act in that there

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are not weighed down by constituency responsibilities. The truth of the matter is that the Senate is a very undistinguished assembly—a very pale shadow of the House of Commons, which elects the Senators. To pay Senators £400 plus expenses would indeed be an insult to the Commons, which is not so much better paid." *Belfast Telegraph*, Nov. 28, 1955.

[18] 63 & 64 Vict. c. 12.

[19] 9 Edw. 7, c. 9.

is no equivalent of that part of section 63 of the 1909 measure which specifies the presiding officer and procedure for a joint sitting. In the thirty-seven years of the Northern Ireland Parliament's existence no occasion for holding a joint sitting has arisen, so the procedure to be used is a minor constitutional mystery which time has yet to solve.

PROCEDURE AND CEREMONIAL

Possibly because the first Clerk of the Parliaments in Northern Ireland had been a clerk in the House of Lords, the Standing Orders of the Senate are modelled on those of the Lords. The Speaker of the Senate is, however, in a different position from that of the Lord Chancellor. He is elected by his fellow Senators; he holds office so long as he is a Senator (unless, of course, he dies, resigns or is removed by a vote of the Senate); he is paid an annual salary of £2,000[20]: and he does not, like his Commons counterpart, require the Governor's approval of his appointment. Unlike the Lord Chancellor, the Speaker of the Senate is, by Standing Orders IV to XI, given disciplinary powers over the members of the House and the conduct of its business. Yet the aura of the peerage hung around the Speaker's chair during the first twenty-nine years of the Senate's existence, for the first two Speakers were also members of the House of Lords.

In certain other respects the procedure used by the Senate resembles that of the Lords. For example, Senators make introductory remarks when asking questions, and the procedure for passing Bills includes the putting, after Third Reading, of the question "That this Bill do now pass." The method of taking a division in the Senate is by roll call, and the reason for this is architectural. During the first eleven years of the Northern Ireland Parliament's life the chamber in which the Senate sat was not suited to the taking of a vote by passing through division lobbies, so the roll call method was authorised by Standing Order XVI. When in 1932 both Houses moved to the present building at Stormont, on the outskirts of Belfast, the Standing Order was not changed. Although the present Senate chamber is provided with division lobbies, these have never been used and the original method of collecting the voices continues.

The Senate's Standing Orders, unlike those of the Commons, contain no special provisions relating to money Bills. The practice is not to consider appropriation or Consolidated Fund Bills in committee. As for Finance Bills, the practice has varied but when the Senate has gone into committee it has usually only been for the discussion of details. On two occasions when amendments were put down they were either ruled out of order or withdrawn.[21] There has therefore been no amendment of a Finance Bill, even in details, by the Senate.

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[20] Speaker of the Senate Act (Northern Ireland), 1921 (12 Geo. 5, c. 7 (N.I.)) as amended by the Ministerial and other Offices Act (Northern Ireland), 1955 (c. 28).

As regards other types of Bills involving taxation, it has been ruled that the Senate may not amend Bills introduced into the House of Commons on a financial resolution.[22] This gave rise to some difficulty during the 1956–57 session, when a Licensing of Dogs Bill was sent up by the Commons. This measure both increased the fee for dog licences and altered the method of obtaining licences, as well as amending and consolidating the relevant legislation. Since the Bill had been introduced into the Commons on a money Resolution, the ruling was given that it could not be amended by the Senate in any way. This restrictive interpretation of their powers was not to the liking of some Senators, and the Bill was refused a Second Reading.[23] The Government dropped the measure, and the possibility of convening a joint sitting disappeared. As for amendments increasing " any proposed charges or burdens on the people," an amendment to extend the category of a person qualifying for financial benefit under a Bill has been ruled out of order on this ground.[24] Occasionally the House of Lords technique of the " privilege amendment " has been used. By this method, a Bill not primarily relating to finance may be introduced in the Senate, its financial provisions being omitted after Third Reading but restored by the Commons, to whose amendment the Senate agrees.[25] This device gives the Senate a slightly wider legislative field than it would otherwise have.

In the matter of ceremonial, the Senate plays a role similar to that of the House of Lords, but on a reduced scale. At the opening of a new Parliament the procedure for commanding the election of a new Speaker of the Commons, and for approving him, follows the Westminster pattern. At the beginning of each session the Commons attend the Senate to hear the Governor read the Queen's Speech, and at the end of each session they attend to hear the Speaker of the Senate read the prorogation proclamation. The procedure for announcing the Royal Assent to Bills is, however, different from that at Westminster, for in Northern Ireland this is done in both Houses on the same day, usually by the Prime Minister or his deputy in the Commons and by the Leader of the House in the Senate. That some importance is attached by Senators to ceremonial matters is shown by the fact that two years ago a spirited debate took place on a proposal that each session should be opened in the Central Hall of the Parliament Buildings at Stormont rather than in the Senate Chamber.[26] Although the proposal was agreed to, some Government supporters voted against it, showing that even in a short period ceremonial practices may arouse feeling among those who participate in them.

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[21] 18 Senate Debates (N.I.), col. 581; 30 Senate Debates (N.I.), col. 388.

[22] 18 Senate Debates (N.I.), cols. 581–584.

[23] 40 Senate Debates (N.I.), cols. 600–616, 690. A similar ruling was given on the Senate's inability to amend the Betting and Lotteries Bill (Northern Ireland), 1957; 41 Senate Debates (N.I.), cols. 449–451.

[24] 21 Senate Debates (N.I.), cols. 163–165.

[25] For a recent example, see 40 Senate Debates (N.I.), cols. 245, 311.

THE EX OFFICIO MEMBERS

The Lord Mayor of Belfast and the Mayor of Londonderry are the sole survivors of the various proposals for *ex officio* members in an Irish second chamber. Before 1957 it was contended that an *ex officio* Senator who held a disqualifying office would have been incapable of sitting and voting in the Senate, but would not have been deprived of his office as Senator.[27] The House of Commons Disqualification Act, 1957,[28] now makes it clear that *ex officio* and elected Senators are in the same position as regards disqualification.

Since the Northern Ireland Parliament was inaugurated in 1921 ten individuals (all Unionists) have held the office of Lord Mayor of Belfast for varying periods. Two of these had been members of the Northern Ireland House of Commons; one did not succeed in being re-elected, and the other achieved the distinction of being an M.P. in the morning and an *ex officio* Senator in the afternoon.[29] Another Lord Mayor represented a Belfast constituency in the House of Commons at Westminster during his term of office. A fourth, having been an *ex officio* member of the Senate, was later returned as an elected member, but became an *ex officio* member again on re-election to the office of Lord Mayor. By contrast, none of the twelve Mayors of Londonderry (all but one Unionist) had any previous Parliamentary experience when they entered the Senate. The occupations of these twenty-two *ex officio* Senators were varied, as those of the holders of municipal offices usually are, but most of these members were company directors of different concerns, though three (all Lord Mayors of Belfast) were estate agents, while another was a stockbroker. The business community has been strongly represented by the *ex officio* members.

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[26] 39 Senate Debates (N.I.), cols. 867–876.

[27] Sir Arthur Quekett, *The Constitution of Northern Ireland, Part III.* (1946) p. 214.

[28] 5 & 6 Eliz. 2, c. 20, s. 6 and Third Schedule.

[29] 39 Senate Debates (N.I.), col. 410.

The part played by the *ex officio* members in the proceedings of the Senate has varied according to the personality of the member and the length of his membership. The first Mayor of Londonderry, a Nationalist, did not take his seat, but his Unionist successors have done so, as have all the Lord Mayors of Belfast. Four of these members have not spoken in the Senate during their terms of office, while several others have broken their silence only on rare occasions. On the other hand, one Lord Mayor of Belfast (who sat for fifteen years from 1931, with an interval in 1942) and two Mayors of Londonderry (who shared the Mayoral chair between 1929 and 1939) were more frequent contributors to the debates. The impression gained from scanning the volumes of debates is that the thirties was the most vociferous period for the *ex officio* members. Another impression, similarly gained, is that these members did not regard themselves merely as exponents of the views of the local authorities they represented, though of course on occasions when some expression of local authority opinion was called for it was forthcoming. However, the relations between the two corporations and the Government have been regulated in the normal way, by official correspondence and discussions, and by deputations to Ministers, rather than by discussion on the floor of the Senate.

THE ELECTED MEMBERS

In all, ninety-three individuals have been elected to the Northern Ireland Senate. Ninety-two of these were male, the solitary exception having been elected in 1950. Over half of these (forty-eight altogether) first entered the Senate at a by-election, while of those who first became Senators at a general election (other than those at present in the Senate) only twelve completed their one or two terms of office at a subsequent general election. The length of time served by the elected Senators has varied considerably. One of those originally elected in 1921 was still in the Senate when the eighth Parliament of Northern Ireland was dissolved in February, 1958, his total service then being thirty-six years and eight months. By contrast, one Senator served for a bare calendar month before resigning to contest, successfully, a seat in the House of Commons. The average length of service so far has been about nine years and six months, that is, a year and a half more than a Senator's full term.

The political affiliations of these ninety-three Senators have been predominantly Unionist, since seventy-four of them belonged to the Government party. There have been fourteen Nationalists, two Labour representatives, one Independent Unionist and two Independents. The ratio of Unionist Senators to others has varied over the years. During the first four years of its existence, the Senate was entirely Unionist (though one Senator, Viscount Pirrie, had been a Liberal and a supporter of Home Rule) since the Nationalist and Republican members of the House of Commons did not take any part in the first Senate election. In 1925 the first non-Unionist Senator, a Labour member, made his appearance, but it was not until 1929 that the Nationalists secured representation by the election of three Senators. In the result, the largest number of Opposition members in the Senate at any one time was in 1949–50, when there were five Nationalists, an Independent Unionist and a Labour Senator.[30] At the moment the elected members consist of nineteen Unionists, four Nationalists and one Independent. With this may be compared the state of the parties in the Lower House at the recent dissolution, when there were thirty-six Unionists (and two vacant seats which had been held by Unionists), seven Nationalists, three Labour members representing different groups, two Abstentionists, one Independent Unionist and one Independent.

Three points may be made about the political composition of the Senate. The first is that since 1921 three of the Unionist seats have in practice been reserved for representatives of the Ulster Unionist Labour Association, an association of trade unionists with Unionist views. If one of these seats becomes vacant, it is filled by a Unionist Labour nominee, of whom there have been ten in all. The second point is that, when a Unionist candidate has to be selected to contest a by-election, or to replace a member whose term of office has expired, the tendency is to select a person from, or representative of, the same county as that of his predecessor. This is the nearest approach to any kind of territorial representation which is possible under the Act of 1920. Thirdly, in eight cases by-elections have been held on the death or resignation of Senators other than official Unionists. Four of these seats—two occupied by Nationalists, one by an Independent and one by Labour—were filled by Unionists, but on the other four occasions Nationalist candidates have been returned unopposed, whereas they would not have secured a majority of the votes of the predominantly Unionist House of Commons.

The Senators have had links with both Houses of Parliament at Westminster and with the Lower House in Belfast. There were six members of the peerage (including one who had held office, and an Irish Representative peer) in the first Senate, and another Irish

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[30] Professor Mansergh gave the balance of parties in the Senate in the mid-thirties as Unionist 14, Independent Unionist 7 and Nationalist 5 (*The Government of Northern Ireland: A Study in Devolution* (1936) p. 158). Excluding the two *ex officio* Senators who were Unionists, and using the classification adopted in this article, the analysis for 1933 would be Unionists 18, Nationalists 5, Independent 1.

Representative peer was elected in 1925. At present the link with the House of Lords is preserved by one Senator who succeeded to the peerage since his election. Two of the peers in the first Senate had also been members of the Westminster House of Commons, as had three other original Senators, including one who had held office. These three continued as M.P.s for part of the time they were Senators, but their periods of dual service were eclipsed by that of another Senator who sat from 1921 until 1940 and who also represented Queen's University, Belfast, at Westminster from 1923 until 1940. The lure of Westminster is a strong one, for two Senators had unsuccessfully contested United Kingdom elections before becoming Senators, while one of these and another Senator sought, but did not obtain, election to Westminster after they had become Senators.

Of the eleven former Northern Ireland M.P.s who became Senators, three were elected for the purpose of taking office, and two of these came direct from the Commons. Only eight persons (including three former M.P.s) who have been defeated at elections for the Commons have later become Senators, so the Senate is hardly a repository for frustrated popular representatives. But the relative importance of the Lower House is shown by the fact that five former Senators obtained seats in the Commons in preference to continuing their Senatorial careers.

The occupations of the elected Senators have been extremely varied, and any classification must be general. But, placing the peers, the " county gentry " and the farmers in one group, and the company directors and merchants in another, it appears that these number slightly less than two-thirds of the ninety-three elected members; moreover, these two groups are roughly equal in size. It is not surprising that in an area like Northern Ireland, the greater part of which is devoted to agriculture, more than a quarter of the Senators should be primarily interested in agricultural affairs, while others had an indirect interest in them. Again, the term " company director " might cover anything from the directorship of a large shipyard to that of a small concern. Of this commercial group, five members have been connected with the licensed trade and four with the linen industry, three have been stockbrokers and three newspaper proprietors.

A greater variety of occupation appears among the remaining elected Senators. To the ten Unionist Labour Senators who were engaged on manual or clerical work may be added four others, including two commercial travellers. Then there was a group of professional people, composed of nine lawyers (three silks at the Northern Ireland Bar, an English barrister and five local solicitors), three doctors, an accountant and a civil engineer. There have also been three journalists, a social worker and a former professor in a theological college.

At the moment the Senate is fairly evenly divided between twelve members with agricultural and commercial interests, and a group consisting of three trade unionists, three solicitors, two journalists and the accountant, social worker and theological professor just mentioned. In the absence of any system of vocational representation, the method of election by the House of Commons has resulted in the choice of Senators as widely varied in occupation as the members of the electorate.

Like the *ex officio* Senators, the elected members have differed greatly in the amount of their Parliamentary work. One method of comparison is provided by the indexes to the reports of debates. These show that, apart from three members first elected in 1957 who have yet to make their maiden speeches, four Senators did not take any part in the Senate's debates. Two of these were in the first Senate, while the third sat for a full eight-year term, and the fourth for more than seven years, without breaking their silence in the Senate except to take part in divisions. In contrast, the Senator who sat for the shortest period—a bare month—took the opportunity of asking a question. There have been a number of other Senators whose activities have been confined to an occasional question or interjection, or perhaps the task of moving or seconding the customary address in reply to the royal speech at the opening of a session.

As a tailpiece to these comments on the elected Senators, mention may be made of the record of one Senator who on his retirement in 1937 was within one month of his ninety-third birthday. But elsewhere in the Commonwealth a different system of selecting the members of the Second Chamber can produce centenarian representatives, as has happened in Canada.[31]

THE GOVERNMENT AND THE SENATE

Representation of the Government in the Senate had been achieved by appointing one member of the Cabinet and one Parliamentary Secretary from among the Senators. In 1921 the Marquis of Londonderry, who had been Under Secretary for Air at Westminster, was given the Education portfolio in the first Northern Ireland Cabinet. He led the Senate until his resignation in 1926, but the link with the peerage was continued by the appointment of Viscount Charlemont as his successor. In 1937 the third Minister of Education resigned his seat in the Commons (where he had been Parliamentary

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[31] R. MacG. Dawson, *The Government of Canada* (2nd ed., 1954), p. 338.

Secretary to that Ministry for twelve years) and was elected to the Senate. Similarly, in 1943 a junior Whip left the Commons and entered the Senate when he became Minister of Education. The connection between the Senate and the Ministry of Education was broken in 1944, when a new Leader of the Senate was appointed Minister without Portfolio. In the following year, however, he was appointed Minister of Commerce, a post which he held until his election in 1950 as Speaker of the Senate. Since 1951 the Leader of the Senate had held the Cabinet post of Minister in the Senate, but has not been head of a Government department. In sum, six Ministers have held the Leadership of the Senate, for periods varying from eight and a half months to eleven years, and for over three-quarters of the Senate's life the Leader has also been head of a Government department.

The Government's junior representative in the Senate had always been the Parliamentary Secretary to the Department of the Prime Minister. As such, he has no departmental duties but, like the Leader for whom he deputises, he may have to deal with the business of any of the seven Ministries. Five individuals (two of them peers) have held this office, the longest term being eleven years and the shortest one year. Thus the number and the average length of service of Leaders and Deputy Leaders have been approximately the same.

Another aspect of the relations between the Government and the Senate is shown by the use made by Ministers who are M.P.s of the right to sit and speak in the Senate. During the four sessions of the 1953–58 Parliament the Prime Minister and six of his Cabinet colleagues (the solitary exception being the Minister of Finance) made statements or took part in debates on thirty-three occasions. The majority of these appearances were for the second readings of Bills, when the Minister replied to the debate. On eight occasions Ministers took part in the committee or report stage debates, and on six occasions they discussed motions moved by Senators or otherwise contributed to the proceedings of the Upper House. The right of Ministers to sit and speak is especially valuable when measures of importance or technicality are being discussed, for the presence of the Minister in charge of the Bill relieves the Leader and his deputy of coping with all government business.

THE SENATE'S WORK

The Senate's functions are those customarily attributed to a Second Chamber—the initiation of uncontroversial legislation, the revision of legislation passed by the Lower House, the discussion of matters of public interest in an arena not directly overshadowed by the hustings. An additional function is that which was much stressed during the Home Rule debates—the protection of minority interests.

Once again the work of the 1953-1958 Parliament provides convenient material for comparing the activities of the Senate and the House of Commons. For example, the following table shows the number and length of the sittings of each House.

	SENATE		COMMONS	
Session	Sittings	Hours	Sittings	Hours
1953–55	51	35	77	196
1955	40	55	69	166
1956–57	39	44	72	175
1957–58	50	36	78	168
Totals	180	170	296	705

From these figures (the second and fourth columns of which are approximate) it appears that the Senate's sittings were about two-thirds of the number of the Commons' sittings, while the average length of a Senate sitting was less than an hour, compared with almost two and a half hours for the Commons. Another method of comparison relates to the initiation of public Bills, for which the figures are as follows.

Session	Bills introduced in Senate	Bills introduced in Commons	Acts passed
1953–55	5	38	41
1955	4	26	30
1956–57	3	24	24
1957–58	4	34	34
Totals	16	122	129

The fraction of Bills introduced in the Senate is little more than a tenth of the total. On the other hand, since one of the Bills introduced in the Senate, as compared with eight of those introduced in the Commons, failed to run the full legislative course, the proportion of failures is approximately the same. Of the Bills originating in the Senate, three (about one-fifth of the total) were sponsored by Private Members, while only a twentieth of the Bills introduced in the Commons (six in all) were sponsored by back benchers. One of the Private Members Bills introduced in the

Senate failed to reach the statute book, while four of those introduced in the Commons did not achieve that desired haven of all legislative proposals.

A more detailed comparison of the legislative work of the two Houses is based on the number of amendments made or proposed during the four relevant sessions, as shown in this table.

	SENATE			COMMONS		
	Amendments			**Amendments**		
Session	made	rejected	withdrawn	made	rejected	withdrawn
1953–55	14	11	7	84	14	3
1955	22	7	9	95	2	8
1956–57	9	3	0	74	0	1
1957–58	10	5	1	54	13	3
Totals	55	26	17	307	29	15

The numbers of unsuccessful amendments (either rejected, or discussed and then withdrawn) were approximately the same for both Houses. Since, however, most Bills were introduced in the Commons, most of the amendments were made there. Numerically, the revisions made by the Senate have been small.

Another aspect of the Senate's activities is shown by the number of divisions and the views of the members participating in them. During the 1953-58 Parliament the Senate divided on some fifty occasions. About a fifth of these divisions, nine in all, did not follow the normal political lines, but not all of these divisions could be classed as revolts against the Government. Four of them took place on Private Members' Bills on which there was a free vote, and a fifth was concerned with the meeting-place of the Senate for the ceremonial opening of Parliamentary sessions. On one occasion two Unionists voted against the Government, and on another a Unionist Senator provided the sole opposition. In the result, there were only two divisions which can be regarded as desertion of the Government by its supporters. In 1954 a set of draft regulations were referred back for reconsideration and amendment. These were reintroduced and passed without a division shortly afterwards, this being one of the occasions on which a Minister attended to take part in the debate and explain why the Senate's suggestions for revision were not accepted by the Government.[32] The second division took place when the back benchers combined with one member of the Opposition in refusing to give a second reading to the Licensing of Dogs Bill, 1956, mentioned earlier in relation to the Senate's powers to deal with financial legislation. Although the Government's fate does not depend on the Senate's decisions, this was clearly an event which, if it had occurred in the Commons, would have been regarded as a major Government defeat.

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[32] 38 Senate Debates (N.I.), cols. 538–552, 579–601.

Such formal expressions of the Senate's opinion show the extent to which Senators are prepared to vote for the exercise of the Senate's revising or delaying powers. As the figures for the divisions indicate, the numerically small Opposition has been responsible for a considerable part of the Senate's activities, and this impression is confirmed by the pages of the debates. In questions, debates on Bills, amendments and adjournment discussions the names of the Opposition Senators figure regularly. These Senators have fully justified Sir Samuel Hoare's wish, expressed during the debates in 1920 on the Government of Ireland Bill—

> " . . . to give a platform to minority representatives from which they can put their case and by means of which they can create public opinion on their side. I believe, whatever may be the number of their representatives, that the mere possession of that platform will be of very great advantage." [33]

OPINIONS EXPRESSED ABOUT THE SENATE

It is perhaps not surprising, in view of its origin, that the Senate should have attracted comparatively little comment. It has drawn only occasional attention to itself, as when a Government measure has been defeated; and it has been from time to time the place for making statements of public importance, such as that relating to the recent disqualification of a Senator and three M.P.s (including the Speaker of the House of Commons) as holders of "offices of profit." [34] But such comment as has been made on the Senate has treated it as a functional chamber but not a vital one.

Thus, for example, Professor Nicholas Mansergh, examining the first fifteen years of the Senate's existence, referred to the lack of an effective Opposition, to the brevity of the Senate's sessions, and to its work in initiating and revising legislation. On the last point he remarked that the Senate's size and length of membership admirably equipped it for these tasks, but that the members elected and the Senate's status did not produce more than the introduction of a small proportion of minor Bills, and the making of a number of amendments on details. As he put it "There exists too close an agreement in political opinion as between the members of the party predominant in both Houses for the Senate to exercise its powers in matters of principle."[35] Looking at these conclusions twenty years later, it appears that the amount of legislation initiated in the Senate, and the type of amendment made there, have not changed greatly. On the other hand, the fairly lengthy average membership does lead to the accumulation of a certain amount of Parliamentary experience, and the number and total length of the Senate's sittings have increased. Moreover, the Opposition's Parliamentary activity is in inverse proportion to its numbers, though the political identity between the two Houses to which Professor Mansergh referred continues.

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[33] 129 H.C. Deb. 5s, col. 1263.

[34] 39 Senate Debates (N.I.), cols. 923–926. *Cf.* 1956, Cmd. 9698; 549 H.C. Deb. 5s, cols. 2313–2315; 550 H.C. Deb. 5s, cols. 951–956; Validation of Elections (Northern Ireland) Act, 1956 (4 & 5 Eliz. 2, c. 35); G. Thomson, "Disqualification of Members of the Parliament of Northern Ireland holding Offices of Profit under the Crown," (1956) 25 *The Table* 35. The 1956 occasion was the second appearance of a Prime Minister of Northern Ireland in the Senate, the first having been on the Second Reading debate of the Intoxicating Liquor Bill (Northern Ireland) 1923; *cf.* 3 Senate Debates (N.I.) col. 249.

Another academic commentator, Professor F. H. Newark, writing twelve years later, doubted whether bicameralism in Northern Ireland had been successful and continued—

> "The House of Lords is a glamorous historical accident, and the glamour of its former days is some excuse for its present shortcomings. The Northern Ireland Senate, on the other hand, can claim neither the veneration due to antiquity nor the respect due to impartial independence."[36]

Along similar lines is the criticism that ". . . the members are chosen more for party services than for intellectual or administrative attainments, and as a consequence the Upper House has little influence on law making and contributes only in a minor way to the discussion of affairs."[37] One who devoted a part of his official time to watching the Senate at work summed up his impressions thus—

> "Apart from its formal utility as a means of giving Ministries the chance of overtaking legislative errors which have eluded the observance of the Commons, or of introducing small changes which Ministers have thought of as last-minute improvements, the Senate, to put it bluntly, is a wholly ineffective body. On odd occasions it picks up errors by the draftsman of Bills or adopts his second thoughts. It is a

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[35] *Op. cit. ante*, n. 30, pp. 155–159.

[36] "The Constitution of Northern Ireland: The First Twenty-five Years" (1948) 8 *Northern Ireland Legal Quarterly* 52, 58–59. *Cf.* also Newark, "The Law and the Constitution" in T. Wilson (ed.) *Ulster Under Home Rule* (1955) pp. 32–33.

[37] J. E. Sayers, "The Political Parties and the Social Background" in Wilson, *op. cit.*, p. 60.

> convenient medium to try out some harmless Bill before it reaches the Commons. It has the weariness of age upon it without its garrulousness. Unlike the House of Lords, it lacks members who, because of wide experience in other domains, carry weight with the public or the party. It is too much of a home for discards or the aged. If it died from inanition, it would go down upwept to oblivion." [38]

It is noteworthy that such criticisms have not evoked any volume of opinion in favour of altering the Senate's constitution, say by transferring the four members who sit for Queen's University, Belfast, from the Commons to the Senate; or by formally allocating seats to particular areas; or by securing some kind of vocational representation; or by altering the method of election. (There are plenty of precedents in the Home Rule proposals). One reason may be that any such change would involve amendment of the Government of Ireland Act, 1920, and most of the patches put on that much mended piece of legislation have related to the Northern Ireland Parliament's powers rather than its composition. The situation is perhaps best summed up by applying generally to the Senate Professor Mansergh's phrase about the method of indirect election—"it has given neither great satisfaction nor great dissatisfaction." [39]

CONCLUSION

In Northern Ireland the reluctant acceptance of a Second Chamber has resulted in a certain amount of apathy, not (in recent years at any rate) in its activities but in the attitudes taken to it. As has been seen, its members vary and are drawn from different community groups, though there is not such a wide range of political opinion. Its work is smaller in volume than that of the Commons, but nevertheless useful. A vocal minority can make it an effective platform, and to that extent fulfils the aim of the 1920 proposal for bicameralism. But the merits and demerits of bicameralism have not been a burning issue in Northern Ireland, where discussion on constitutional matters tends to turn into other channels. In other parts of the Commonwealth the difficulties of bicameralism are discernible. The Australian experience of Upper Houses has been varied [40]; the alterations of the South African Senate have been subject to searching criticism[41]; in Canada, the system of nomination for life has come under heavy fire, and indeed the method of election for a fixed term, such as is used in Northern Ireland, has been proposed as a remedy.[42] The experience of Northern Ireland is not exceptional, though distinctive local conditions have given rise to difficulties bred of the political situation. Yet while there remains on the statute book of the Mother of Parliaments a declaration that the House of Lords stands in need of reform,[43] a much smaller constitutional vessel, and a subordinate one into the bargain, can perhaps hardly be blamed for not venturing on waters which were troubled at Westminster a decade before the term "Northern Ireland" appeared on the statute book.

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[38] G. C. Duggan, "Northern Ireland—Success or Failure?" *Irish Times,* May 1, 1950. Dr. Duggan was formerly Comptroller and Auditor-General in Northern Ireland.

[39] *Op. cit.* p. 156.

[40] *Cf.* the summary by G. Sawer, "Constitutional Law," in G. W. Paton (ed.) *The Commonwealth of Australia: The Development of its Laws and Constitution* (1952) pp. 40–41.

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[41] *Cf.* B. Beinart, "The South African Senate," (1957) 20 *Modern Law Review* 549.

[42] *Op. cit. ante*, n. 31, p. 356.

[43] Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), preamble.

THE CONSTITUTIONAL POSITION OF THE CHURCH OF SCOTLAND

R. King Murray

There is a widespread impression amongst constitutional lawyers that the Church of Scotland is not in the full sense an established church. In this article the writer seeks to correct this impression, and to show that the constitutional basis and status of the Church of Scotland have been misrepresented. This task entails some analysis of the meaning of church establishment in the United Kingdom.

At the outset it must be conceded that there is an apparent anomaly in the idea that a single United Kingdom can have two state-established churches of different denominations, one in England and another in Scotland. The anomaly has no doubt helped to foster the impression that the Church of Scotland is not established in the same sense as the Church of England. To show that there is such an impression, reference need only be made to a standard textbook such as Hood Phillips' *Constitutional Law* (Second Edition, 1957) where the author says, at p. 587, that the Church of Scotland " is not, however, an ' established ' Church, except in the sense that its form of government is laid down in a Scottish Act of 1690 and preserved by the Act of Union, and its courts are recognised by the Church of Scotland Courts Act, 1863, as forms of public jurisdiction." It is hoped to show in detail that this is an understatement of the position, but it may suffice at this stage to point out that the authority cited by the author for this proposition is the Free Church of Scotland case.[1] The Church of Scotland was not a party to that case, nor were its rights and status in dispute. The churches involved were the Free Church of Scotland and the United Free Church of Scotland, neither of which had, at that time, any legal connection with the Church of Scotland. Accordingly any observations in that case upon the Church of Scotland, which might have a bearing upon its establishment, were strictly *obiter*. In fact, it is doubtful whether any of the observations of the judges in the House of Lords were intended to refer to the Church of Scotland as such.

The Church of Scotland is a reformed protestant church with a non-episcopal form of government. Its beginnings as a doctrinal body date from the year 1557. It was not until 1560, however, that the new doctrine obtained official recognition. In that year a protestant confession of faith was debated in the Scots Parliament and enacted, by the Act 1560 cap. 1,[2] as the law of the land. As from the coming into force of that Act, the Roman Catholic doctrine was ousted from its position as the official faith of Scotland. Prior to this, the Roman Catholic Church did not call itself the national Church of Scotland, for it was rather a local part of the church universal, with exclusive jurisdiction in Scotland in matters ecclesiastical. If anything, the state was regarded as established in the church, not the church in the state. It was on this sort of footing that the clergy constituted the First Estate of the Three Estates (the Scots Parliament). But the new church, which received statutory authority in 1560, can truly be said to be a state-established church, for its legal title lay in a legislative enactment of the state. Whatever its spiritual authority might be, from a legal point of view the Church of Scotland first established itself upon the secular authority of the state. The legal basis of the Church of England was exactly the same.

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[1] [1904] A.C. 515, 7 F. (H.L.) 1.

By the Act 1560 cap. 2, the jurisdiction of the Pope in Scotland was abolished, but it was not until the Act 1567 cap. 12 that a new ecclesiastical jurisdiction was substituted for it. The exclusive and universal character of this new jurisdiction was affirmed by the Acts 1579 caps. 6 and 7. The new church based its spiritual authority solely upon the Old and New Testaments, as the word of God. It was therefore not essentially episcopal, and at an early stage the scriptural foundations of episcopacy were questioned. This criticism, together with the immediate need for a new episcopal authority to replace Rome, led to the so-called " Black Acts," the Acts 1584 caps. 1, 2, 4, 5, and 20. Although the first of these Acts reaffirmed the legal basis of the reformed church, the later ones affirmed the King's right to spiritual as well as to temporal sovereignty, forbade spiritual as well as temporal assemblies without royal licence, restricted the public activities of ministers, and provided for the appointment of archbishops and bishops by the King. On the other hand, the growing presbyterian organisation of the church was not expressly altered. By 1592, presbytery had triumphed over episcopacy, and by the Act 1592 cap. 8 (widely known as " the Charter of the Church ") there was established by statute the distinctively presbyterian organisation of the church, by general assembly, synod, presbytery and kirk session. This Act vested spiritual and ecclesiastical jurisdiction in Scotland solely in the established presbyterian church, but reserved the right for the sovereign or his commissioner to attend the General Assembly of the Church of Scotland before its dissolution, and to appoint the meeting of the next Assembly (which failing the Assembly was to make its own appointment). The present government of the Church of Scotland dates from this Act, which is still in force.

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[2] Reference to the Scots Acts is made, wherever possible, to the record edition.

From this date forward the presbyterian organisation of the Church of Scotland is never wholly lost, despite Stuart attempts to introduce episcopacy and enforce it universally. These attempts started with the Act 1606 cap. 2, which provided for the restitution to the bishops of their estates. The Act 1609 cap. 8 restored to the archbishop and bishops their jurisdiction in ecclesiastical and commissary matters. By the Act 1612 cap. 1, the Acts and conclusions set down and agreed upon in the General Assembly held in Glasgow in June, 1610, were ratified. These provided for the King to be the head of the Church and for the bishops to be the moderators in every diocese—an interesting combination of presbytery and episcopacy. The Act 1592 cap. 8 was repealed (temporarily). The *status quo ante* was restored by the Act 1633 cap. 4, which " ratified the Acts and statutes made before anent the liberty and freedom of the Kirk of God," but it was not until September 24, 1639, that the Acts introducing episcopacy, and repealing the Act 1592 cap. 8, were themselves formally rescinded. After the Restoration, the Act 1662 cap. 1 provided that the bishops should sit again in the Scots Parliament; while presbytery was once more ousted from exclusive control of the church by the Act 1662 cap. 3, which purported to " re-establish the ancient government of the church by archbishops and bishops." Episcopacy finally came to an end, following the Claim of Right, by virtue of the Act 1689 cap. 4, which abolished " prelacy and all superiority of any office in the church . . . above presbyters." The Act 1690 cap. 7 ratified and confirmed the presbyterian establishment as originally enacted by the Act 1592 cap. 8, which was thereby finally revived.

Throughout these vicissitudes, the fundamental basis of the reformed Church of Scotland, as enacted in the Acts 1560 caps. 1 and 2, stood fast. These Acts are still in force, as are the Acts of 1592, 1689 and 1690.[3] Together they form the *corpus* of statute law which established, and still establishes, the Church of Scotland. From this it can be seen that it is not accurate to suggest, as Hood Phillips does, that the establishment of the Church of Scotland is to be found entire in the Act of 1690.

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[3] The Claim of Right, 1689, which was enacted in the Act 1689 cap. 28, and which provided for the abolition of prelacy as one of its conditions, is also still part of the statute law of Scotland.

The reformed Church of England had a similar statutory origin in the Acts of Supremacy, 1534 and 1558, and the Act of Uniformity, 1558. Hence in 1690 the two separate states of Scotland and England had each their own distinctive state church established by law. The purely personal union of the two kingdoms, under James VI and I and his successors, did not affect the legal basis of either establishment. It was characteristic of the Church of England in 1690 that the monarch was the head of the church, exercising spiritual as well as temporal sovereignty in the land. The Crown controlled the offices, doctrine, and legislation of the church, so transforming it into a national church, an "Anglican" one. The Church of Scotland, in contrast, continued the claim—however empty the reality might be—to be the universal catholic church, exercising absolute spiritual sovereignty in the land; just as the state, under the monarch, exercised absolute temporal sovereignty. The church claimed a jurisdiction co-ordinate with that of the state, but not derived from it. The head of the church was Christ Jesus, not the temporal sovereign, but in return for its co-operation with the state, the church was considered entitled to exclusive state protection through establishment. It exercised its exclusive rights *jure divino,* not just by the right of the state. So the General Assembly legislated (and still legislates) by Acts of Assembly, which are regarded by the church as statutes of the realm, needing no royal assent.[4] The Scottish monarch, as temporal sovereign, was necessarily associated with the established church. The proper constitutional relationship between them was laid down in the Act 1592 cap. 8. The assumption in the Act was that the state consisted of two parts, the spiritual and the temporal; the church was the spiritual sovereign and the monarch was the temporal sovereign, but the two realms were complementary constituents of the state. From this standpoint, the Church of Scotland was just as much a state church as the Church of England, although the connection between the church and the monarch was conceived in a different way. The Church of Scotland was conceived as a constituent of the state rather than as a subordinate part of it.

In that situation the Treaty of Union, 1707, was concluded and ratified by enactments in both Scotland and England. It was provided in each of the ratifying Acts that the respective Acts of Security for each country—which guaranteed permanently their respective established churches—should be fundamental and essential conditions of the Union.[5] Thereafter a wholly new element was introduced into the establishment of the churches in the two countries. For, as and from the Union, the Church of England was re-established in England, as part of Great Britain, by Treaty and by an Act of the Scots Parliament; while the Church of Scotland was reciprocally re-established in Scotland, as part of Great Britain, by Treaty and by an Act of the English Parliament. (It should possibly be mentioned, in passing, that—as the wording of Article 1 of the Treaty of Union shows—the Union was essentially a union of the separate states or kingdoms of Scotland and England, not merely a union of their parliaments.) This unique attribute of establishment is shared equally by the Church of Scotland and the Church of England.

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[4] The General Assembly claimed the right to alter the terms of Acts of Parliament on spiritual matters. This claim is at least partially conceded in the Church of Scotland Act, 1921.

Like the Church of England, the Church of Scotland exercises a universal territorial jurisdiction in the whole country and in every parish. The parish churches are its churches, and it alone has the right and duty to minister to every parish in the land. So too the Church of Scotland courts are common law courts of ecclesiastical jurisdiction.[6] No other church in Scotland has courts in the legal sense. Only ministers of the Church of Scotland are, by the law of Scotland, holders of a public office having a right to ecclesiastical titles.[7] These privileges exactly parallel those of the Church of England.

Since the Union, there is a sense in which it can be said that there are two established churches throughout the united realm, and the United Kingdom Parliament has in fact enacted United Kingdom statutes in relation to each of the established churches. Territorially, however, they have tended to remain distinct and exclusive. The last Church of England church in Scotland was closed in 1925,[8] but anomalously there are still at least two Church of Scotland Churches in England (there is also a Church of Scotland Presbytery of England, distinct from the Presbyterian Church of England). The United Kingdom Parliament has made two inroads upon the exclusive rights and privileges of the Church of Scotland. In 1711 it introduced toleration for episcopalian worship in Scotland by the Scottish Episcopalians Act, 1711. Prior to this, episcopalian worship had been held to be illegal in Scotland until the appeal in *Greenshields'* case.[9] Parliament also restored patronage in 1711, which ultimately led to the Disruption of 1843 (and so proved a fertile source of litigation).

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[5] It is sometimes forgotten that the Act of Union, 1706, is not the sole legal basis of the Union still subsisting. That Act is only the English ratifying Act. It is a pre-Union statute and applies only to England. Likewise the Scottish ratifying Act, the Act 1707 cap. 7, which is still in force, is a Scottish Act applying only to Scotland. Both Acts are necessary in law for the continued subsistence of the United Kingdom of Great Britain. See T. B. Smith, "The Union of 1707" [1957] P.L. 110.

[6] Their legal recognition is not due simply to the Church of Scotland Courts Act, 1863, as Hood Phillips suggests (*Constitutional Law*, 2nd ed., p. 587). See *Lockhart* v. *Presbytery of Deer* (1851) 13 D. 1296.

[7] *Drummond* v. *Farquhar* (July 6, 1809), Faculty Collection.

[8] There remains, as a "free" church, the Scottish Episcopal Church, which is subject to certain statutory disabilities

The Church of Scotland finally vindicated its traditional claims, however, obtaining the abolition of patronage[10] and the enactment of a remarkable constitutional statute, the Church of Scotland Act, 1921, which is a United Kingdom Act. This Act was passed to facilitate reunion with one of the Disruption churches (the United Free Church) but the opportunity was taken to enact a far-reaching declaration of the Church of Scotland's constitution as an established church. The provisions of the Act were expressly stated to be declaratory of the foundation Acts of 1560 and 1592, and not to their prejudice. Section 1 of the Act declares the lawfulness of the Declaratory Articles passed by the General Assembly and scheduled to the Act. It also provides that the Declaratory Articles are to rule the construction of all statutes and laws affecting the Church of Scotland, and that all such statutes and laws are repealed in so far as inconsistent therewith. Section 2 saves the rights of other Christian denominations in Scotland. Section 3 reserves the jurisdiction of the civil courts in civil matters. Art. 1 of the Declaratory Articles declares that the Church of Scotland is part of the Holy Catholic or Universal Church. Art. 2 declares its presbyterian church government. Art. 3 declares the continuity and identity of the church with that " which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union, 1707." The Article continues that the church " as a national Church representative of the Christian Faith of the Scottish people . . . acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry." Art. 4 declares that the church receives its powers and authority solely from God and subject to no civil authority, and also that the civil authority has no right of interference with the legislation, doctrine, proceedings or judgments of the church within its spiritual jurisdiction.

By this remarkable statute the United Kingdom Parliament has expressly admitted the legislative sovereignty which the General Assembly has always claimed in the ecclesiastical sphere, and, by implication, it seems to have conceded that there is at least one respect in which the United Kingdom Parliament is not sovereign. This power of ecclesiastical legislation is a very real mark of freedom, but not at all a mark of disestablishment. For what established church could ask for a greater measure of state association than to share with the civil authority the legislative power of the state?

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[9] *Greenshields* v. *Mags. of Edinburgh*, 1709, Robert. 12.

[10] 37 and 38 Vict. C. 82.

Until the reorganisation of local government in Scotland by the Local Government (Scotland) Act, 1929, the Church of Scotland was actively associated in local government through parish committees. The only remaining link of this utilitarian nature (which is of significance) arises in connection with the administration of the marriage laws. The parish church in Scotland is not a local registry of marriages, as it is in England, but it is the place where the official banns are called, and the minister issues certificates to this effect to the registrar. To this limited extent the Church of Scotland, like the Church of England, is an agent of the executive in the administration of the marriage laws. Also like the Church of England, the clergy of the Church of Scotland are excluded from the House of Commons by the House of Commons (Clergy Disqualification) Act, 1801.

Something should perhaps be added about the position of other churches in Scotland. They all have the legal status of private associations, and are known to the law as " voluntary churches " in contrast with the established church. Thus the Roman Catholic Church (which has a separate hierarchy in Scotland) is a voluntary church. Unlike the other voluntary churches, the Scottish Episcopal Church (legally a separate body from the Church of England) is subject to certain statutory disabilities. Under the Scottish Episcopalians Act, 1711, and the Scottish Episcopalians Relief Act, 1792, no episcopalian service may be held in a parish church. All episcopalian pastors must make a declaration of faith and register with the local authority, under pain of statutory penalties. A prayer for the royal family must be made at every episcopalian service. A person who attends an episcopalian service twice in one year without such a prayer being said, is liable to a sentence of six months' imprisonment. None of these disabilities, it may be added, are visited upon the other voluntary churches.

To complete the picture of church establishment in Scotland, something should be said about the relationship between the Crown and the church. Normally the first act of a sovereign of the United Kingdom, on accession, is to take a statutory oath, provided for in the Act of Security for the Church of Scotland, to maintain the establishment of the Church of Scotland. The monarch officially attends public worship in the Church of Scotland when in Scotland. The Crown appoints certain ecclesiastical officers in the Church of Scotland: the Dean of the Thistle, the Dean and Chaplains of the Chapel Royal (an institution having a continuous existence from A.D. 1107). The Crown (the Government of the day) appoints the Lord

High Commissioner to the General Assembly. By convention, the monarch does not exercise the right of personal attendance reserved in the Act 1592 cap. 8. Likewise by convention, the Commissioner is a member of the Church of Scotland and usually also of the government political party. He attends the Assembly and sits in a place of honour which is technically not within the Assembly. He takes no more than a ceremonial part in the proceedings. By convention, too, the monarch's right—also reserved in the Act 1592 cap. 8—to appoint the next Assembly, is never exercised, either personally or by the Commissioner. The Commissioner holds royal court at Edinburgh during the Assembly, and during that time he enjoys an exceptional precedence for a commoner, *viz.* next after the eldest son of the sovereign and before the other royal dukes (apart from a prince consort).

This short account of the establishment of the Church of Scotland is perhaps sufficient to demonstrate that, though differing in important respects from the establishment of the Church of England, it has much in common with it, and that the Church of Scotland is no less entitled to be regarded as a state-established church. The common features may be summarised: both churches were initially established by Act of Parliament, both were re-established by the Treaty of Union, 1707, and by reciprocal ratifying Acts; the monarch, at the start of a reign, takes an oath to uphold each establishment; the monarch is associated officially with each church; both churches have universal territorial and parochial jurisdiction; the courts of both are courts of law; both assist the state in administering the marriage laws; the clergy of both are excluded from the House of Commons. There are two main points of difference. Firstly, the Church of England, unlike the Church of Scotland, is in a real sense subordinate to the state, having the monarch as its spiritual head and being subject to the direct control of the executive and legislature; on the other hand, it is represented in the legislature by those bishops who have seats in the House of Lords. Secondly, the Church of Scotland, as befits its claim to share the legislative function of the state in its own right with the civil authority, has no direct representation in Parliament such as that enjoyed by the Church of England; on the other hand, its legislative sovereignty in ecclesiastical matters has been confirmed by the United Kingdom legislature.

It is submitted that these differences do not warrant the inference that the Church of Scotland is not a fully established church. On the contrary, when they are considered along with the factors which the establishments of the Church of Scotland and of the Church of England have in common, the proper legal inference would seem to be that they are co-ordinate establishments in the United Kingdom.

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This digest, which has been compiled by the Editor, covers the period from January 1, 1958, to March 31, 1958.

UNITED KINGDOM

COMPULSORY PURCHASE

Number of orders

Housing Act, 1936, Part V, and Housing Act, 1957, Part V, and Town and Country Planning Acts. The Minister of Housing and Local Government stated the number of compulsory purchase orders made under these Acts during 1957 and the acreage covered. Under the Housing Acts, the number was 235 (acreage 1,656), and under the Planning Acts, 50 (acreage 100) (581 H.C. Deb. *84*, January 29, 1958; and see above, p. 70).

Scotland

Regulations have been issued making the necessary amendments to certain of the forms prescribed under the Compulsory Purchase of Land (Scotland) Regulations, 1949, following on the provisions of section 22 of the Housing and Town Development (Scotland) Act, 1957, which makes available in specified circumstances a special procedure for the compulsory acquisition of land under the Housing (Scotland) Act, 1950, or Part I of the Housing (Repairs and Rents) (Scotland) Act, 1954 (S.I. 1957 No. 2248).

COURTS

Judicial Committee of the Privy Council

Rules revoking and replacing the Judicial Committee Rules, 1925, as amended have been published, with certain changes. The most important changes are: 1. Provision is made for the Records and Cases to be duplicated instead of printed. 2. At present a litigant cannot proceed *in forma pauperis* unless he proves he is not worth £25 in the world. £100 is now substituted for £25. 3. (*a*) The Council Office fees, other than the taxing fee, are increased by 25 per cent. (*b*) The taxing fee (which at present is at the rate of 2½ per cent. up to £300 and thereafter 1 per cent.) is to be at the rate of 2½ per cent. throughout (S.I. 1957 No. 2224).

Legal Aid

Alimony pending suit. The plaintiff wife was the respondent to a petition for divorce presented in March, 1955. On June 14, 1955, she applied for a civil aid certificate to defend, to cross-petition and to claim ancillary relief. On June 27, 1955, an order was made for alimony pending suit at £450 a year. This was her only disposable income. On August 18, 1955, she was offered a civil aid certificate on the basis that her disposable income had been assessed at £370 a year. She applied in the Divorce Division for a declaration that the payments under the order for alimony pending suit should not be taken into account as part of her disposable income. *Held*, the alimony was part of the wife's resources and properly included in computing those resources; the ownership of the alimony was not being attacked in any proceedings at the time when the rate of income was being computed by the National Assistance Board: TAYLOR *v.* NATIONAL ASSISTANCE BOARD [1958] 2 W.L.R. 11; [1957] 3 All E.R. 703, H.L.; and see [1956] P.L. 277; [1957] P.L. 175.

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Central Land Board

Account has been published of the payments by the Board and of the sums issued out of the Consolidated Fund for 1956–1957; together with the report of the Comptroller and Auditor General thereon (H.C. 65 of 1957–58).

Civil Service

Oversea C.S. The Overseas Service Act, 1958 (6 & 7 Eliz. 2, c. 14), implementing Cmd. 9768, received the Royal Assent on March 13, 1958 (see also [1956] P.L. 253–254).

Wireless and television. The Prime Minister made a statement and published Establishments Circular No. 9/56 on the general position concerning broadcasts by civil servants on sound radio and television (584 H.C. Deb. 1098–1104, March 18, 1958).

Inspectorate

Factories. The annual report of the Chief Inspector of Factories, for 1956, has been published (Cmnd. 329).

Mines. The reports for 1956 of H.M. Inspectors of Mines have been published for the North Western, North Eastern, East Midland, and South Western Divisions (41–28–5, 3, 4, 7–56).

Ministers' Functions

Agriculture. The annual review and determination of prices, 1958, have been published (Cmnd. 390).

Education. The Ministry of Education has published a memorandum on the Ministry estimates, 1958–1959 (Cmnd. 377).

The House of Commons debated an Opposition motion on educational policy on March 20, 1958 (584 H.C. Deb. 1453–1574).

Health. Part II of the Report of the Ministry for 1956 has been published, being the annual report of the Chief Medical Officer (Cmnd. 325; and see above, p. 71).

Housing and Local Government. The Ministry has published a circular on the Report of the Committee on Administrative Tribunals and Enquiries (see below, p. 186).

New Towns

Accounts have been published showing the sums issued out of the Consolidated Fund, and the advances made therefrom to development corporations in England and Wales and Scotland under the Acts for 1956–57; together with the Report of the Comptroller and Auditor General thereon (H.C. 93 of 1957–58).

Legislation. The New Towns Act, 1958 (6 & 7 Eliz. 2, c. 12), received the Royal Assent on February 20, 1958. It amends section 12 (1) of the New Towns Act, 1946 (as amended by the New Towns Act, 1955) by increasing from £250m. to £300m. the aggregate amount of the advances which may be made to development corporations under that subsection for defraying expenditure properly chargeable to capital account; and repeals the Act of 1955.

The Act of 1958 amends section 13 of the Act of 1946 by requiring that the annual reports to the Minister of the corporations shall include a copy of the audited accounts, and by repealing the requirement that copies of the audited accounts shall be sent to the Comptroller and Auditor General. (This is to avoid duplication of the presentation of accounts to Parliament, and the Comptroller and Auditor General will still be sent copies of the corporations' accounts by the Ministers; see 578 H.C. Deb. 1310, November 28, 1957).

Prices, Productivity and Incomes

Report. The first report of the Council (Chairman: Lord Cohen) has been published by H.M.S.O. The terms of reference are: "Having regard to the desirability of full employment and increasing standards of life based on expanding production and reasonable stability of prices, to keep under review changes in prices, productivity and the level of incomes (including wages, salaries and profits) and to report thereon from time to time."

Research

Department of Scientific and Industrial Research. The report and statements of accounts for 1956–57 have been published (H.C. 99 of 1957–58).

Treasury Solicitor

Appearance for private individual. The mere *ipse dixit* of a Minister of the Crown that he or his department has an interest in legal proceedings, to which neither he nor the Crown is a party, is not conclusive and does not preclude the court from inquiring whether that is so or not, when objection is taken to the intervention of the Treasury Solicitor. *Per curiam,* in BROWNSEA HAVEN PROPERTIES *v.* POOLE CORPORATION (see below, p. 168).

Tribunal of Inquiry

Bank rate. The report of the Tribunal has been published. In its conclusions, the Tribunal observed that it had unhesitatingly reached the unanimous conclusion that there was no justification for allegations that information about raising of the Bank rate was improperly disclosed to any person. The report went on to say that: "We have found the occasions on which and the circumstances in which prior disclosure was made by Ministers of the proposed restrictive financial measures. We have also found that, in every case, the information disclosed was treated by the recipient as confidential, and that no use of such information was made for the purpose of private gain. As we said at the outset, the propriety of such disclosure is a matter for Parliament alone. We, however, understand and appreciate the reasons for the decision of the Chancellor of the Exchequer, with the approval of his Cabinet colleagues, to explain in advance to Press representatives, the Conservative Central Office and representatives of industry, the nature of the intended restrictive financial measures, having regard to the serious financial situation and the urgency created by his imminent visit to Washington" (Cmnd. 350).

In the course of the debate in the House of Commons on February 3, 1958, on the report of the Tribunal, the Home Secretary and Leader of the House, Mr. Butler, made a statement on proposals for changes in the practice and constitution of the Bank of England arising out of the position of part-time directors of the bank. In its conclusions, the Tribunal had observed on the matter of part-time directors: "This raises a general and very important question of policy with which we are clearly not concerned. Had it been our duty to express an opinion on this matter, we should, before doing so, have required exhaustive evidence as to the advantages and disadvantages of continuing a state of affairs which has so long existed. The criterion, of course, must be the national interest."

Mr. Butler said that the Government had come to the conclusion that it was a question which was within the terms of reference of the committee at present sitting under Lord Radcliffe to inquire into the workings of the monetary and credit systems. The Chancellor of the Exchequer had requested Lord Radcliffe to confirm that his committee would include this question in its report and would make recommendations upon it, together with all other aspects of the monetary and credit systems, and Lord Radcliffe had confirmed that his committee would do this (581 H.C. Deb. 831–832).

The full debate is to be found in 581 H.C. Deb. 819–952, 989–1132, February 3 and 4, 1958. The proceedings of the Tribunal have been published by the Home Office (H.M.S.O. 34–390).

HIGHWAYS

Nuisance

Liability of adjoining occupier. M. was walking along the pavement of a public highway when her left leg went through a defective iron grating. The purpose of the grating was to admit light to the cellar of the adjoining premises. G., the occupier of the adjoining premises, knew of the condition of the grating. M., in an action for damages against G., accepted that the grating formed part of the highway at the time of its dedication. *Held*, that the defective grating constituted a nuisance on the highway, for which G. was responsible under section 35 (1) of the Public Health Acts Amendment Act, 1890: MACFARLANE *v.* GWALTER [1958] 2 W.L.R. 268; 1 All E.R. 181, C.A.

HOUSING

Recovery of possession

Notice to quit. C was the tenant of a council house owned by B. Rent was due on Mondays; and the agreement provided that " the tenancy may be terminated . . . by the giving of one week's notice before 12 noon on any Monday." In August, 1956, B sent C a circular, purporting to raise C's rent; C, however, refused to pay any increase. On June 14, 1957, B served on C a notice " to quit and deliver up the premises . . . by noon on Monday, July 1, 1957." In an action for possession, arrears of rent (represented by the purported increase) and mesne profits, the Court of Appeal (Hodson and Pearce L.JJ. and Upjohn J.) *held* (1) that section 85 (6) of the Housing Act, 1936, did not give B the power to override the tenancy agreement: if B sought to increase the rent, he must first determine the contractual tenancy; (2) that the notice of June 14, 1957, was bad as a notice to quit because it did not expire at the same time as the tenancy: the notice expired at noon on July 1, 1957, the current period of the tenancy twelve hours earlier. BATH-AVON RURAL DISTRICT COUNCIL *v.* CARLILE [1958] 2 W.L.R. 545, C.A.

Subsidies

Rents test. The Ministry of Housing and Local Government has issued Circular No. 57/57, dated December 31, 1957, announcing a new rents test for authorities applying for the discretionary subsidy under section 5 of the Housing Subsidies Act, 1956. The new test will be whether the total net rents of the existing dwellings in the authorities' housing revenue account exceeds twice their total gross values for rating purposes.

See also COMPULSORY PURCHASE (above p. 163).

INQUIRIES

Bank Rate

See above, p. 165.

Transport

Railway. The Reports have been published (a) on the collision on June 30, 1957, at Herne Hill (dated October 16, 1957); (b) on the derailment on June 17, 1957, at Uddingston (dated November 14, 1957); (c) on the collision on August 9, 1957, at Staines (dated January 6, 1958); (d) on the accident on September 14, 1957, at Allanfearn (dated December 3, 1957).

LOCAL GOVERNMENT

Finance

Borrowing. The rates of interest chargeable on loans advanced from the Local Loans Fund from February 25, 1958, were reduced to 6¼ per cent. for loans for more than fifteen years, and 6½ per cent. for shorter periods (S.I. 1958 No. 289, revoking S.I. 1957 No. 1712).

Economy. On January 27, 1958, the Ministry of Housing and Local Government issued Circular No. 4/58 asking all local authorities, in considering their budgets for 1958–59, to ensure that all possible economies were achieved.

On the same date, the Ministry of Education issued Circular No. 334 to the same purpose, dealing specifically with the admission of children under five, for the education, awards, recreation and social and physical training, capital expenditure from revenue, and renewal and replacement of furniture and equipment.

Rating and valuation. The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *Horace Plunkett Foundation* v. *St. Pancras B. C.* [1958] 1 W.L.R. 30, D.C.; *Royal College of Nursing* v. *St. Marylebone B.C.* [1958] 1 W.L.R. 95, D.C.

On failure to appeal to next practicable quarter sessions from refusal of relief under section 8 of the Act of 1955, see *Eccles and Pendleton Branch, Royal Air Forces Association* v. *Eccles B. C.* (1957) 51 R. & I.T. 61.

On baker's oven as " building or structure " within Rating and Valuation Act, 1925, see *W. Collier Ltd.* v. *Fielding* (*Valuation Officer*) [1958] 1 W.L.R. 323, C.A.; similarly, on underground petrol storage tank, see *Shell-Mex and B.P. Ltd.* v. *Holyoak* (*Valuation Officer*) [1958] 1 W.L.R. 331, C.A.

On slaughter-house as " industrial hereditament," see *Fatstock Marketing Corporation Ltd.* v. *Morgan* (*Valuation Officer*) [1958] 1 W.L.R. 357, C.A.

On meaning of " hereditament shown in the valuation list " in Rent Act, 1957, Sched. 5, para. 2, see *Holland* v. *Ong* [1958] 2 W.L.R. 448, C.A.

The Minister of Housing and Local Government stated that he had appointed a committee (chairman: Sir Fred Pritchard, M.B.E.) " to review the present treatment for rating of hereditaments in England and Wales occupied for purposes of a charitable nature or for other similar purposes (other than hereditaments to which section 7 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applies); to consider in particular the provisions of section 8 of the Act of 1955 and of the Scientific Societies Act, 1843; and to advise on the proper treatment for rating of the hereditaments within these terms of reference " (580 H.C. Deb. *213*, January 23, 1958).

Returns have been published for Scotland of rates (1956–57 and 1957–58), rateable values (1957–58), population and area, 1957 (H.M.S.O. 49–282–0–58).

Police

Amalgamation. The Report has been published of the inquiry into the proposed compulsory amalgamation of the police forces of the counties of Carmarthen and Cardigan (Cmnd. 374; and see [1957] P.L. 360).

See also PARLIAMENT, **Estimates Committee (House of Commons)** (below p. 183).

Population

The annual estimates have been published of the population of England and Wales and of local authority areas, as at June 30, 1957 (H.M.S.O. 70–587–0–57).

Powers

A county council let to a tenant for one year premises on which he carried on the business of repairing motor-vehicles. The premises, which adjoined agricultural land belonging to the council, occupied less than an acre and, therefore, did not constitute a "smallholding" within section 66 of the Agriculture Act, 1947. The council, having served a notice to quit, opposed an application by the tenant for a new lease under the Landlord and Tenant Act, 1954, on the ground that they intended to demolish the premises within section 30 (1) (*f*) of that Act. It was established that the council had delegated their powers as a smallholding authority under the Agriculture Act, 1947, to a smallholdings committee, which had passed a resolution that the buildings on the premises in question should be demolished and the site let for agricultural purposes. *Held* (1) that the council's intention to demolish was a valid ground for possession albeit that it was subsidiary to the intention to let the premises to an agricultural tenant; (2) that the council as a smallholding authority had power to deal with units which were not themselves smallholdings, and a determination of intention of the committee could be a determination of intention of the council themselves: however, on the evidence, it was clear that the intention was that of the council in addition to the committee, and the application for a new lease should be refused: CRADDOCK *v.* HAMPSHIRE COUNTY COUNCIL [1958] 1 W.L.R. 202; [1958] 1 All E.R. 449, C.A.

Section 21 of the Town Police Clauses Act, 1847, provides: "The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses and persons, and for preventing obstruction of the streets . . . in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed. . . ."

The Poole Corporation, purporting to act under section 21 of the Act of 1847, made an order creating one-way traffic in certain streets for all vehicles for a period of six months from April to October. On an application by the owner of an hotel on one of the streets in question for a declaration that the order was *ultra vires,* Vaisey J. declared accordingly. On appeal the corporation was represented by the Treasury Solicitor. *Held,* (1) that the Crown had a sufficient interest in the subject-matter of the appeal to justify its intervention by the Treasury Solicitor on behalf of the corporation; (2) that although the word "route" in section 21 included the idea of one-way traffic, the words "in any case" should be confined to occasions *ejusdem generis* with public processions, rejoicings and illuminations and were not intended to cover the ordinary traffic conditions in particular streets; (3) that although there were decisions of the Divisional Court to the contrary effect they should, in all the circumstances, be disapproved in so far as they rested on the unlimited construction of the words "in any case"; accordingly, the appeal would be dismissed: BROWNSEA HAVEN PROPERTIES *v.* POOLE CORPORATION [1958] 2 W.L.R. 137; [1958] 1 All E.R. 205, C.A. (affirming on other grounds decision of Vaisey J., see above, p. 75).

See also COMPULSORY PURCHASE (above p. 163), HOUSING (above p. 166), HIGHWAYS (above p. 166), PUBLIC HEALTH (below p. 184), TOWN AND COUNTRY PLANNING (below p. 185), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below p. 186).

MONOPOLIES AND RESTRICTIVE PRACTICES

Reports

Ninth Annual Report (*for 1957*) of the Board of Trade on the operation of the Monopolies and Restrictive Practices Acts, 1948 and 1953 (as amended by the Restrictive Trade Practices Act, 1956), has been published (H.C. 98 of 1957–58).

The Monopolies Commission have the following references before them at present: (a) the supply of certain chemical fertilisers; (b) the supply of cigarettes and manufactured cigarettes and pipe tobacco; (c) the supply of machinery for the manufacture or packaging of cigarettes or of cigarette or pipe tobacco; (d) the supply of electrical equipment for mechanically propelled land vehicles; (e) a reference under section 12 of the Act of 1948 requiring the Commission to report whether and to what extent the parties concerned have complied with the recommendation in the Commission's report on the supply of imported timber.

Oxygen and other industrial gases. The President of the Board of Trade stated that the Government did not propose to take any action on the majority recommendation that steps should be taken to regulate the level of the British Oxygen Co.'s prices and profits on oxygen and dissolved acetylene. The other matters on which the Commission made recommendations had been the subject of discussions between the Board of Trade and the company, and the company had at the board's request given certain undertakings on those points (584 H.C. Deb. *181–182*, March 21, 1958).

NATIONAL HEALTH SERVICE

Contributions

Debate. On February 25, 1958, the House of Commons in Committee of Ways and Means approved a motion to increase the rates of contribution set out in Schedule I to the National Health Service Contributions Act, 1957 (583 H.C. Deb. 221–279). The Bill received a Second Reading on March 5, 1958 (583 H.C. Deb. 1185–1298).

Remuneration

Royal Commission. The Minutes of Evidence have been published of the 1st Day (Socialist Medical Association; Whole-Time Consultants' Association); 2nd Day (Joint Consultants' Committee); 3rd and 4th Days (Medical Practitioners' Union; Lord Moran of Manton); 5th and 6th Days (British Medical Association); 7th Day (Royal College of Physicians of London).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below p. 186).

NATIONAL INSURANCE

Benefits

Australia. An Order has been made giving effect to an agreement made between the Government of the United Kingdom and the Commonwealth of Australia. Residence in the United Kingdom will now count as residence in Australia as a qualification for Australian benefits; and reciprocally. In other ways the previous arrangements are extended and simplified. The agreement covers family allowances and benefits for old age, widowhood, sickness and unemployment (S.I. 1958 No 422; Cmnd. 378).

Norway. The social security agreement with Norway has been ratified and came into force on April 1, 1958. It covers benefits provided by schemes of national insurance, industrial injuries, family allowance and national assistance; also medical treatment for British nationals in Norway, including tourists (S.I. 1958 No. 423; see also 584 H.C. Deb. 924–925, March 17, 1958, and [1957] P.L. 362).

Classification

Selected Decisions. The Ministry of Pensions and National Insurance has published the eighth pamphlet in this series. For decision relating to resident cleaner and caretaker (M.63) see below, p. 179. (Pamphlet M.8; for summary of M.7 see [1956] P.L. 380–383).

A voluntary patient in a mental hospital had for many years worked regularly within the precincts of the hospital and had also tended the gardens of certain hospital officials. It was held that he was gainfully occupied in employment, but was not employed under a contract of service; and that under the provisions of paragraph 17 of Part III of the First Schedule to the National Insurance (Classification) Regulations, 1948 (S.I. No. 1425 of 1948) he was to be treated as a non-employed person. (Para. 17 provides, *inter alia,* that a person who would otherwise be classified as a self-employed person shall be treated as a non-employed person if his weekly earnings from self-employment are ordinarily less than twenty shillings a week); and *decided* that the patient whilst working in the grounds of and in various gardens both in and outside the mental hospital (*a*) was not employed in insurable employment within the meaning of the National Health Insurance Acts, 1936 to 1941, or of the Unemployment Insurance Acts, 1935 to 1944, during the period from September, 1939, to July 4, 1948; (*b*) was included in the class of non-employed persons for the purposes of the National Insurance Act, 1946, and was not employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946 during the period from July 5, 1948, to September 7, 1950: Decision M.57.

Mr. W. and his brother had taken a lease of a flat. The flat had been damaged by bombs during the war, and substantial repairs and decorations were necessary to make it habitable. About August 25, 1946, the applicant agreed to work for Mr. W. as resident housekeeper when the room she was to occupy in the flat was ready. It was thought that the room would be ready in a week or two but in fact it was not ready until October 13, 1946. From that date the applicant lived in the flat and performed her duties as housekeeper. During the week commencing October 7, 1946, she was moving into the flat and did a certain amount of work in it. On about six occasions between August 25, 1946, and October 13, 1946, the applicant came to see how the repairs were progressing; and on certain of these occasions gave some assistance but received no wage. The applicant contended that she was employed under a contract of service and accordingly employed in employment within the meaning of the National Health Insurance Act, 1936, between August 25, 1946, and October 6, 1946. It was *decided* that the applicant was at no time employed in employment within the meaning of the National Health Insurance Act, 1936 between August 25, 1946, or thereabouts, and October 6, 1946: Decision M.58.

From Decisions M.57 and M.58, the applicant appealed to the High Court. The pamphlet contains extracts from the judgments of Havers J. who dismissed the appeals.

Mr. B., a clergyman, was approached by the Bishop of X and offered an appointment as Director of Religious Education for the Diocese of X. Mr. B. accepted the Bishop's offer and shortly afterwards commenced his duties as Director of Religious Education, being introduced by the Bishop to a meeting of the Diocesan Education Committee. Mr. B. was the incumbent of a living in the Diocese with a stipend of £550 a year. The Diocesan Board of Finance approved the annual budget of the Education Committee which included the payment of £200 to Mr. B. for his services as Director of Religious Education, which was in addition to his stipend in respect of his living. This sum of £200 was paid by the Church Commissioners at the request of the Board of Finance. His duties as Director of Education were explained to Mr. B. by the Bishop and by Mr. B.'s predecessor as Director. He was required to attend quarterly meetings of the Diocesan Education Committee and of the Standing Committee. He not only acted as secretary to the Diocesan Education Committee but was required to implement the decisions of the Committee. His duties included work in connection with the finance, administration and development of church schools; lecturing and the organisation of courses of religious instruction for teachers and youth club leaders and for secondary school children; and acting as the Committee's representative on the education committees of the county and city councils. He reported to the Diocesan Education Committee and made suggestions for future work. The Committee had the right to tell him how his work should be done and on what aspects he should concentrate. They also had the right to control his hours of work but did not do so. He had authority to make certain payments through the Board of Finance without reference to the Committee. From time to time he received instructions from the Bishop and from the Assistant Bishop who was chairman of the Committee. He was not subject to day-to-day control. He had the use of an office in the Diocesan House and the part-time services of a shorthand-typist who worked for and was employed by the Board of Finance. The Diocesan Education Committee had the right to dismiss him. It was held that Mr. B. in his capacity as Director of Religious Education was employed under a contract of service; and *decided* that during the period from September, 1953, to April 26, 1956, Mr. B. whilst working as Director of Religious Education for the Diocese of X, was included in the class of employed persons for the purposes of the National Insurance Act, 1946; and was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946: Decision M.60.

An ordained priest was appointed whole-time Church of England Chaplain at a general hospital by a Hospital Management Committee acting on behalf of a Regional Hospital Board. He was paid an annual salary and was expected to find his own accommodation convenient to the hospital. The appointment was terminable by one month's notice on either side. He had the use of an office in the hospital. His official hours were from 9 a.m. to 5 p.m. but he often worked much longer and he held himself available to attend the hospital at any time. A list of duties was given to him. Each week he was required to hold certain services in the hospital chapel and in the wards and to administer Holy Communion to patients and staff who desired it. Most of his time was spent in the wards visiting patients. The purpose of his visits was essentially spiritual but he did what he could to secure the physical and mental comfort of the patients and attended to their domestic difficulties. In ministering to patients he acted in co-operation with the hospital staff and was guided and instructed by them on the medical considerations. The Hospital Management Committee had the power, except in relation to purely spiritual aspects, to require him to alter his approach to a particular patient and also to give him instructions and directions as to his general policy in regard to visiting patients. He was required to report orally to the chairman of the Hospital House Committee once a month. His appointment had at all times been subject to the right of the Hospital Management Committee, acting on behalf of the Regional Hospital Board, to direct him and control him in all ordinary incidents of his employment, for example, as to time-keeping, demeanour in the wards, availability and readiness to carry out his duties, the need for consultation with medical, nursing and other staff and for the subordination of his work to their requirements. It was held that the Chaplain was employed under a contract of service; and *decided* that in respect of services as a Chaplain performed for the Hospital Management Committee on behalf of the Regional Hospital Board at the general hospital during the period from May 2, 1955, to November 12, 1956, the priest was included in the class of employed persons for the purposes of the National Insurance Act, 1946; and was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946: Decision M.61. (In the light of the above decision the Minister reviewed and revised decision number M.52 (see Pamphlet M.7) which related to the Chaplain of a mental hospital.)

Mrs. M. at her husband's request advertised for a gardener. She interviewed and engaged Mr. X who answered the advertisement. He had been a gardener for some fifteen years. It was arranged that he should do gardening for Mr. and Mrs. M. on Mondays and Wednesdays and that his wages should be 26s. a day. On Monday, November 23, 1953 he was taken round the garden by Mrs. M. who told him what vegetables she wanted and the size of the household to be supplied. From that day he worked in the garden from 8 a.m. to 4.30 p.m. on Mondays and Wednesdays. He sowed, planted out and cultivated vegetables. The flower borders were mainly tended by Mrs. M. but whenever so instructed by her he would finish off the work she had begun. She would also tell him where she required flowers, seedlings, etc., to be planted. From time to time Mr. M. would require him to cut the grass. On wet days he chopped wood, worked in the greenhouse or did such other jobs as he was instructed to do. On such days Mrs. M. would tell him to go home about midday. Mrs. M. paid Mr. X out of money which her husband gave her for the purpose. He received £2 12s. a week wages from her whether or not he worked two full days; he was also paid for the fortnight he was on holiday. On Monday, September 12, 1955, Mrs. M. told him to finish work that week. It was held that Mr. X was employed under a contract of service; and decided that during the period from September 6, 1954 to September 14, 1955 (which was the period in issue) Mr. X was included in the class of employed persons for the purposes of the National Insurance Act, 1946; and was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946; that Mr. M. was liable as employer for the payment of contributions under the said Acts in respect of the said Mr. X during the said period: Decision M.64.

An Old People's Welfare Council, a voluntary body, ran a night attendance service for old people. Suitable persons willing to act as sitters-in had been enrolled. The full charge for the service was 12s. 6d. a night but it was available free or at a reduced fee to patients who were unable to pay in full. The Welfare Council collected the fees paid by patients and paid the sitters-in 12s. 6d. for each night's attendance and also paid their bus fares. The county council under powers contained in section 28 (3) of the National Health Service Act, 1946, reimbursed the Welfare Council (subject to a yearly maximum) for losses resulting from the reduction or abolition of fees and payment of attendant's bus fares. Mrs. B., a married woman with a family of children, was enrolled as a night attendant. She was not a qualified nurse. She did voluntary work as a member of St. John's First Aid Organisation and in offering to sit with old people she was actuated by a desire to help them and not by the prospect of payment. She would not have enrolled, however, had payment not been made as she used the money to defray the cost of engaging someone to look after her own family while she was away from home and to pay for her laundry and other incidental expenses. Mrs. B. was not bound to attend any particular patient, or to continue to attend a patient; she was not bound to accept any work at all. No elderly person wishing to use the service was bound to accept any particular sitter-in. In order to help the patient Mrs. B. did what she was asked by him or his nurse or relatives. She was not controlled by the Welfare Council or the county council in any way in which she attended the patient. It was held that while acting as a night attendant Mrs. B. was not employed under a contract of service; and *decided* that while Mrs. B. was working as a night attendant in association with the Old People's Welfare Council in the period from 1954 to March 20, 1956, she was not included in the class of employed persons for the purpose of the National Insurance Act, 1946; that she was not employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946; and that no person was liable as employer for the payment of contributions under the Acts in respect of her: Decision M.65.

The applicant entered into a written agreement with a circus proprietor under which he agreed to clown throughout the programme, to drive a heavy vehicle and to assist in building up and pulling down circus tents. The proprietor agreed to pay him £12 a week and to furnish him with sleeping accommodation. The employment was terminable by a fortnight's notice on either side. It was held that the applicant was employed under a contract of service; and *decided* that while working for the circus during the period from April 4, 1955, to September 26, 1955, the applicant was included in the class of employed persons for the purposes of the National Insurance Act, 1946; and was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946: Decision M.66.

Mr. J., and his wife who was employed full-time as a schoolmistress, had two young children. They wished to have a girl to live with them who would help with the domestic work and look after and be a companion to their younger child while Mrs. J. was away from home. During the period from March, 1950, to June, 1955, five Danish girls resided with them successively for periods varying from six months to nearly two years. Mrs. J., with Mr. J.'s consent, wrote to friends in Denmark from time to time to ask for their help in finding suitable girls. When one was recommended Mrs. J. wrote to her telling her the amount of domestic work which would be expected of her and the sum she would be paid weekly (about 32s.), and pointing out that she would have free time in which to study English. If the girl wished to accept the offer she replied accordingly to Mrs. J. With Mr. J.'s consent, Mrs. J. made an application in respect of each girl to the Ministry of Labour and National Service for permission to employ the girl, a foreigner, as a resident domestic, stating the amount of wages it was proposed to pay her. Permits were duly issued to Mrs. J. for the girls to be so employed. The girls regularly performed part-time domestic work for Mr. and Mrs. J. and were paid weekly the sum agreed upon. Mrs. J. told the girls they should normally be available for domestic work throughout the morning. She indicated to them from time to time what work they should do and on occasions how they should do it. Mr. and Mrs. J. sometimes helped the girls with their work. The girls had meals with the family, were introduced to their friends and treated as their social equals. The girls improved their English by conversations with Mr. and Mrs. J. who from time to time would correct their mistakes. Several of them attended courses for foreigners in the English language at a local college and others attended an international club. They had occasional holidays which they spent travelling in Great Britain in order to extend their knowledge of the country. It was held that the girls were employed under contracts of service; and *decided* that while performing domestic work for Mr. and Mrs. J. the girls were included in the class of employed persons for the purposes of the National Insurance Act, 1946; and were employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946: Decision M.67.

Contributions

Mariners. Regulations have been made, in consequence of the National Insurance (No. 2) Act, 1957, to amend the National Insurance (Mariners) Regulations, 1948. They reduce from three-fifths to one-half the proportion of the ordinary employer's contributions which is payable in respect of mariners employed as masters or members of crews who neither are domiciled nor have a place of residence in the United Kingdom. They also increase the reduction, which was authorised by those regulations, in the weekly rate of employer's contributions payable in respect of mariners employed as masters or members of crews of foreign-going ships (S.I. 1957 No. 2243).

Decisions of the Commissioner and the Tribunal

Day of unemployment. For more than a year a machine moulder was employed on four days a week instead of five, this being attributed to

Government restrictions affecting housebuilding and to reduced overseas demand. *Held* that such short-time working had become normal for the claimant and that the two idle days each week were not days of unemployment. The circumstances which caused the short time were not exceptional in the sense of being temporary, sporadic or unlikely to continue. The fact that five-day working had since been reintroduced did not show that the four-day working was all along likely to be temporary: Decision No. R(U) 33/57.

Earnings. A retirement pensioner claimed an increase in respect of his wife who had acquired a wool shop. Her profit and loss account included 15 per cent. of certain capital expenses incurred in the purchase and opening of the business. *Held* that 15 per cent. was a reasonable proportion of the cost of fixtures and fittings and new installations to allow in respect of their depreciation. Also 15 per cent. of that part of the legal expenses incurred in acquiring the fixtures and fittings could be allowed. No sum could be allowed for depreciation of goodwill: Decision No. R(P) 3/57.

Incapable of work. A long-distance lorry driver frequently became an in-patient for short periods in different hospitals all over the country, occasionally being admitted on the same day as he had been discharged elsewhere. He contended that this was due to severe attacks of renal colic caused by driving. Hospital reports were obtained but were not put in evidence because of medical advice that they would be detrimental to the claimant. *Held* that, as the reports from the hospitals were not included in the evidence, they could not be used and the other evidence available did not justify holding that the normal inference that an in-patient of a hospital was incapable of work was rebutted: Decision No. R(S) 1/58.

Inconsistent with retirement. Claimant purported to have retired from regular employment but continued to work as a bookstall assistant for 18 hours per week, 6.45 a.m. to 9.45 a.m. for six days a week. She had worked under the same conditions for three years. *Held* that she could not be treated as retired from regular employment. Her occupation was not peculiarly characteristic of a retired person's occupation and her engagement in it was not occasional or inconsiderable: Decision No. R(P) 4/57.

Claimant had retired at 60 from regular employment in the accountant's department of British Railways. At 65 he was employed as a bank guard for four hours a day on six days a week. His duties were light and consisted mainly of travelling with the cashier to another branch. *Held* that, although the work was of a kind a retired person might reasonably be expected to do, it was inconsistent with retirement by reasons of its extent and regularity: Decision No. R(P) 5/57.

Claimant retired from his occupation of driver/salesman. His wife ran a small licensed house, in which he helped her in the evenings and at midday on Sunday during the summer and less in winter. *Held,* that the claimant was to be treated as retired. Distinction drawn between the case of a barman committed to working set hours and that of a husband giving wife a helping hand as occasion required: Decision No. R(P) 6/57.

Leaving voluntarily. A civil engineer and buyer was awaiting trial for certain acts committed before he entered the employment. By agreement with his employer he ceased work pending the result of the trial. He was convicted and did not return. *Held* that he did not leave his employment voluntarily. He merely anticipated a decision by his employers to dismiss him: Decision No. R(U) 1/58.

Marriage by cohabitation with habit and repute. A woman had lived with a man as his wife for many years. They wanted to marry but the woman believed that she was already married. She then discovered that she had been free to marry as her supposed marriage was bigamous. She continued to live with the man as his wife. *Held* that matrimonial consent can be presumed to have been given on the date when they knew they were free to marry, there having been sufficient cohabitation with habit and repute following that date: Decision No. R(P) 1/58.

"*On holiday*." Claimant, a building worker, was entitled to two weeks' holiday. He claimed benefit for a week over Christmas when his firm was closed for annual holidays. He contended that he had already had two weeks' holiday, one week in August during previous employment and one week after that employment ended. *Held* that as he was not under contract of service during the latter week he could not be deemed not to be on holiday in the Christmas week: Decision No. R(U) 27/57.

Refusal of vocational training. A blind woman, suffering from keratitis, was undergoing a course of vocational training. She gave it up in order to have a baby and declined to resume afterwards. The training was designed to fit her for work and would have no effect on her blindness. *Held* that her failure to attend the course was not behaviour calculated to retard her recovery. "Recovery" means recovery from the disease or disablement causing incapacity, and the training would not have improved her blindness. Also she had not refused medical or other treatment, which means treatment for the disease or disablement. In relation to sickness benefit there is no provision concerning a claimant refusing such vocational training. The claimant was not disqualified for receiving sickness benefit: Decision No. R(S) 3/57.

Subsidiary occupation. A professional footballer who lost his principal employment as a kiosk attendant was under contract to play on Saturdays when selected and to attend for training as required by his club. In practice the club left it to his discretion to train as he thought necessary and the claimant contended that this was an implied variation of the terms of the contract. He was paid a wage of £5 a week. *Held,* that the claimant was following the occupation of footballer on every day of the week and his daily earnings, therefore, exceeded 6s. 8d. The claimant's obligations must be judged by the written terms of the contract unless there was satisfactory evidence to show that it had been varied or modified by the assent of the parties either expressed or implied. The training paragraph in the contract excluded in terms certain classes of players but the claimant did not fall in one of those classes: Decision No. R(U) 23/57.

A labourer entered into an agreement to play as a professional footballer. He was bound by the agreement to play and attend for training at any time as required by his club. He usually played each Saturday for which he was paid £5. He claimed unemployment benefit when his employment as a labourer ended. *Held,* that the claimant was following an occupation on every day of the week during the period covered by the agreement and that his earnings exceeded 6s. 8d. a day: Decision No. R(U) 10/57.

Trade dispute. Claimant, who was normally a house painter, was engaged on painting a ship. He participated in a national withdrawal of labour in the shipyards. A week after the stoppage began he obtained employment as a house painter. He resumed work on the ship when the stoppage ended. *Held,* that he was disqualified on the days when he was not working: Decision No. R(U) 28/57.

A chipper and a scraper, employed by a firm of boiler scalers to work on ships in dock, was stood off the day before the commencement of a stoppage of work due to a trade dispute in the ship-repairing industry. *Held,* that under the 12 days' rule the claimant was presumed to have lost employment by reason of the stoppage due to a trade dispute at his place of employment—the dock in which the ships were berthed. This presumption was not rebutted. Decision No. R(U) 26/57.

A riveter became unemployed before a stoppage of work due to a trade dispute began at his place of employment but he did one odd day's work on a Sunday within 12 days of the commencement of the stoppage. *Held,* that the

12 days are to be reckoned from and including the day following the last day of work even though the latter is a Sunday: Decision No. R(U) 29/57.

A painter, employed casually at a dockyard, became unemployed on the completion of the painting of a ship, within 12 days of a stoppage of work due to a trade dispute at the docks. *Held,* that by reason of the 12 days' rule claimant was disqualified during the stoppage. His place of employment was the dockyard: Decision No. R(U) 30/57.

A boilermaker, employed at a shipyard, was discharged within 12 days before a stoppage of work due to a trade dispute began there. *Held,* that the disqualification began on the first day of the stoppage. In the case of an intermittent worker discharged within 12 days of a stoppage it is presumed (unless the contrary is proved) that, if there had been no stoppage, he would have been employed again after the date on which the stoppage began: Decision No. R(U) 31/57.

A plater's helper was discharged owing to shortage of work within the 12 days before a stoppage of work due to a trade dispute in the shipyards in which he was employed. The local tribunal imposed disqualification from the date of discharge. *Held,* that there was evidence that it was the impending strike that induced the employer to discharge the claimant and there was no evidence to rebut the presumption that the claimant had lost employment during and by reason of the stoppage. Disqualification, however, applied only from the date of the stoppage: Decision No. R(U) 3/58.

An agreement to end a trade dispute stoppage was made but the workers' return was gradual due to a shortage of work occasioned by the stoppage. *Held,* that the stoppage continued until a substantial proportion of the labour force resumed work. Principles laid down for determining the end of a stoppage of work: Decision No. R(U) 25/57.

A binman, employed by a local authority, was dismissed along with several others because a work target set by the employer had not been attained. The remainder stopped work in sympathy. The work target had been a matter of controversy for some time, but the claimant's association contended that the dispute to which the stoppage was due arose only on the dismissal and could not have caused it. *Held,* that the stoppage was due to a dispute which had been smouldering and not to a new dispute arising for the first time after the men's dismissal: Decision No. R(U) 32/57.

A lorry driver, employed by a firm of ship repairers, was given notice owing to a shortage of work resulting from a stoppage of work due to a trade dispute in the shipyards. The transport section was organised as a separate branch of work and occasionally did haulage work for other firms in the area. *Held,* that the transport section was a separate place of employment from the ship-repairing premises and there was no trade dispute in the transport section: Decision No. R(U) 24/57.

Claimant was employed loading stones on to a ship. He lost employment during a stoppage of work due to a trade dispute in the shipyards. It was contended that his place of employment was the ship on which he was working and there was no stoppage there; and that although he subscribed to a union which was paying strike pay, he was not financing the dispute as the strike pay was not paid out of subscriptions but out of interest from the union's investments. *Held,* that his place of employment was the docks where he worked and not merely the particular ship on which he was engaged at the time. He was unable to discharge the burden of proving that neither he nor any member of his grade or class was financing the dispute since he was admittedly a subscribing member of a union paying strike pay from its funds: Decision No. R(U) 4/58.

Unemployed. A worker was subject to an industrial agreement whereby Whit Monday was not a normal working day for which a holiday bonus was payable whether or not he was required to work. He was not so required and received the bonus payment only. *Held,* that the claimant was not employed on Whit Monday. The agreement meant that he undertook to keep himself at the disposal of his employer on that day in return for the payment guaranteed: Decision No. R(U) 5/58.

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Contributions

Mariners. Regulations have been made which further modify the provisions of the National Insurance (Industrial Injuries) Act, 1946, in relation to mariners by reducing the amount of the contribution payable by an employer in respect of masters or members of the crew of ships other than home trade ships by one penny in the case of persons over the age of 18 and by one half-penny in the case of persons under that age. (S.I. 1957 No. 2244.)

Decisions of the Commissioner and the Tribunal

Incapacity for work—not result of relevant injury. In 1947 a colliery worker suffered an injury resulting in loss of sight of his right eye in respect of which he received workmen's compensation. By 1955 he had lost the sight of his left eye. *Held,* that compensation supplement was not payable. The claimant had not proved that his incapacity for work resulted from the relevant injury. Total blindness could not be attributed to the accident as there was no causal link between the relevant injury and the loss of sight of the left eye. The relationship between trauma and detachment of the retina of the eye discussed: Decision No. R(I) 42/57.

"Out of and in the course of employment." A civil servant on his way to work was injured whilst on a private roadway providing access to blocks of Government offices within an enclosed area. *Held,* that the claimant had entered upon his employment and that the accident arose out of and in the course of that employment. Public use of the road was limited to those persons visiting the offices on business. Decisions C.I. 39/50 (reported), R(I) 23/55 and R(I) 20/57 distinguished: Decision No. R(I) 41/57.

A colliery worker complained of a headache while changing at the pit-head baths before commencing work. The liquid from a smelling salts bottle offered by a friend splashed out and injured his eye. *Held,* that the injury was not caused by accident arising out of and in the course of his employment. Use was not made of the first-aid facilities supplied by the employer. Decision R(I) 3/54 distinguished: Decision No. R(I) 43/57.

A paper mill worker was injured while in a part of the mill to which he had gone to spend his mid-morning meal break. He had remained there after other employees had resumed work. *Held,* that the accident was not an industrial accident. At the time it occurred he was not engaged in doing anything connected with his employment: Decision No. R(I) 44/57.

A factory worker, who had insufficient work, left her place of employment without permission, to accompany a fellow worker who had been authorised to draw a new overall from store. While returning, the claimant slipped and injured her leg. *Held,* that the accident was not an industrial accident. At the time it occurred the claimant was not engaged on anything incidental to her employment: Decision No. R(I) 1/58.

Prescribed disease. A watchman at an ammunition dump in a wood claimed to have developed silicosis. When not patrolling the site he used a hut with an earth floor in which there was a coke stove. Dust from the floor rose when he walked over it. *Held* that pneumoconiosis was not prescribed in relation to the claimant. The amount of dust raised was trivial and was not in excess of that met with in the ordinary course of life: Decision No. R(I) 40/57.

Reciprocal agreement. A school teacher was in charge of children on an educational tour to Holland. While on a day visit to Belgium she injured her knee. *Held,* that injury benefit was not payable. At the date of the accident there was no reciprocal agreement in operation between Great Britain and Belgium (Decision R(I) 39/56 distinguished): Decision No. R(I) 45/57.

Review. Claimant awarded disablement benefit assessed at 10 per cent. for life, together with an increase under section 14, elected, after being advised of the alternative methods of payment, to receive benefit by way of pension. A month later he applied for the balance of gratuity to be paid. *Held,* that there was no ground for reviewing the decision that claimant was entitled to disablement pension as it had not been established that the decision was given in ignorance of, or was based on a mistake as to, some material fact or that there had been a relevant change of circumstances: Decision No. R.(I) 38/57.

Workmen's compensation. A chief fire officer, who was permanently and totally disabled in 1941, was in respect of this disablement awarded a pension under the Fire Brigade Pensions Act, 1925. He claimed compensation supplement. *Held,* that as the receipt of such a pension precluded the payment of compensation, the claimant had failed to satisfy the requirements of the Workmen's Compensation and Benefit (Supplementation) Act, 1956, for the payment of an allowance. Commissioner discusses application of amending regulations, which enable a pension under the Fire Brigade Act to be treated as workmen's compensation for the purposes of constant attendance allowance: Decision No. R(I) 39/57.

Insurable employment

Selected decisions. The Ministry of Pensions and National Insurance has published the eighth pamphlet in this series (Pamphlet M.8). For decisions relating to voluntary patient of mental hospital (M.57), director of religious education (M.60), hospital chaplain (M.61), jobbing gardener (M.64), sitter-in to old people (M.65), circus clown and driver (M.66), foreign girls performing part-time domestic work (M.67), see above pp. 169–173; for summary of Pamphlet M.7, see [1956] P.L. 387–388.

A director of a limited liability company was injured by accident on August 17, 1954, whilst working for the company. It was *decided* that the director when working for the company on August 17, 1954, was not employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946: Decision M.59.

From this decision the applicant appealed to the High Court. The pamphlet contains an extract from the judgment of Havers J. who dismissed the appeal.

In January, 1955, Mrs. B., an assistant mistress of physics at a grammar school, took a party of 30 pupils from the school to Switzerland for ski-ing. There were three adults in charge of the party, namely, the assistant mistress, her husband, an experienced skier who was not on the school staff, and the senior physical training master. Mrs. B. was injured on January 6, 1955, while supervising the ski-ing. It was one of the conditions of Mrs. B.'s employment as assistant mistress that she should be employed exclusively in the capacity of a teacher and should not be required to perform any duties except such as were connected with the work of a school. The form of application for the grammar school post which she had completed provided for the applicant to say what extra-mural activities she was prepared to take part in. At the interview before her appointment she agreed, on being asked, to help with games and dramatics. She took up the appointment on September 1, 1951. Mrs. B. had taken a party of pupils to Switzerland on a previous occasion with the approval of the headmaster and the Borough Education Officer. Permission was similarly given for the expedition of January, 1955, although the earliest period for which the party could be accepted was from January 2–11, 1955, which included the first five days of the Spring Term. The expedition was regarded by the Borough Education

Officer as an extra-mural school activity. Mrs. B. sent a letter, approved by the headmaster and signed by her as " Mistress in charge of party," to the parents of the pupils who wished to join the party, giving the cost and other essential information about the expedition. It was sent under the school address, and contained a form for the parent to sign giving consent for his child to join the party and promising to indemnify Mrs. B. in respect of any claims arising from and any reasonable expenses incurred by her in consequence of any illness of or accident to the child. Mrs. B. handled the financial arrangements. She paid her own expenses and received no financial benefit from any source by virtue of being in charge of the party. She made the necessary bookings through the School Travel Agency to whom she passed on the money she received from the parents. She took out a winter sports accident insurance policy, and the party was also covered by the Local Education Authority's Third Party (Scholars) Policy. It was held that while organising and conducting the ski-ing party Mrs. B. was acting solely as a member of the school staff. She was not acting in pursuance of any contract with either the parents or the School Travel Agency: nor had she entered into a separate contract with the Local Education Authority distinct from her original contract of employment as assistant mistress made on September 1, 1951; and *decided* that Mrs. B. who was in Switzerland in charge of a school party during the period from January 2, 1955, to January 10, 1955, was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Acts, 1946 to 1954, during the period from January 2, 1955, to January 10, 1955, by virtue of a contract made between her and the Local Education Committee on September 1, 1951; and was not so employed by virtue of any arrangement made by her with the School Travel Agency or with the parents of the pupils who were members of the said party, or by virtue of any contract made with the said Education Committee other than the said contract of September 1, 1951. (Under the provisions of the National Insurance and Industrial Injuries (Switzerland) Order, 1954 (S.I. No. 641 of 1954) the employment was treated as if it had been employment in Great Britain.) Decision M.62.

A building society allowed Mrs. R. possession of a flat at premises where the society maintained offices. There was no written agreement between the society and Mrs. R. The premises comprised two or more flats which were sub-let by the society to tenants, the flat occupied by Mrs. R. and the society's offices. In return for the occupation of the flat Mrs. R. was required to have charge and care of the premises and to keep the society's office rooms and passages and the common staircase cleaned and aired; her duties included cleaning the carpet with a carpet-sweeper provided by the society, polishing linoleum, dusting office furniture, emptying waste-paper baskets and ashtrays daily, and cleaning the W.C. and wash-basin used by the office staff. The society supplied the cleaning materials. Mrs. R. was required to carry out her duties outside office hours; she was not expected to work for any particular number of hours each week. It was held (a) that Mrs. R. was gainfully occupied in employment, being employment under a contract of service with the society; and (b) that she was not employed as a caretaker within the meaning of paragraph 30 of Part III of the First Schedule to the National Insurance (Classification) Regulations, 1948 (S.I. No. 1425 of 1948). (Paragraph 30 provides that a person employed as a caretaker to whom no money payments are made shall be treated as a non-employed person); and *decided* that, in respect of work done for the building society, Mrs. R. was included in the class of employed persons for the purposes of the National Insurance Act, 1946; and was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Act, 1946: Decision M.63.

NATIONALISED INDUSTRIES

General

Finance. The Nationalised Industries Loans Act, 1958 (6 and 7 Eliz. 2, c. 19), received the Royal Assent on March 26, 1958. This Act extends the operation of section 42 of the Finance Act, 1956, to August 31, 1958. The matter is to be further dealt with in the next Finance Bill (for debate, see 584 H.C. Deb. 445–479, March 12, 1958; and see [1956] P.L. 304, 389; [1957] P.L. 268).

The first annual accounts, for 1956–57, by the Ministers of Power, Transport and Civil Aviation, and the Secretary of State for Scotland, as required by section 42, have been published, together with the reports of the Comptroller and Auditor General thereon; that of the Minister of Transport and Civil Aviation also deals with advances made under the Transport (Railway Finances) Act, 1957 (H.C. 109, 110, 111 of 1957–58).

Members. On February 3, 1958, the Paymaster-General was asked if he would bring forward legislation to make it a condition of membership of the nationalised boards to which he made appointments that other directorships and appointments should be relinquished. The Parliamentary Secretary to the Ministry of Power replied that his noble Friend (the Minister of Power) did not appoint to a board anyone holding any outside appointment which he did not consider appropriate to a member of the board (581 H.C. Deb. 816).

On February 5, 1958, the Minister of Transport and Civil Aviation was asked a similar question. The questioner was referred to an answer given on December 17, 1957 (see above p. 82). A further questioner stated that six part-time members of the British Transport Commission held 32 other directorships between them and that many of the firms of which they were directors made equipment of which the B.T.C. was a substantial purchaser. The reply was that each of these cases was considered on its merits (581 H.C. Deb. 1178–1179).

Resources. On February 5, 1958, the House of Lords debated fuel and power resources (207 H.L. Deb. 429–478).

Airways

Debate. On January 27, 1958, the House of Commons debated the reports and accounts for 1956–57 (581 H.C. Deb. 35–103).

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the British Overseas Airways Corporation (H.C. 68 of 1957–58) and the British European Airways Corporation (H.C. 69 of 1957–58).

Atomic Energy

Committees. Two of the three committees under the chairmanship of Sir Alexander Fleck, which were appointed by the Prime Minister to inquire into the organisation of the Atomic Energy Authority and related matters, following the accident at Windscale in October, 1957, have issued their reports. *The Report of the Committee appointed by the Prime Minister to examine the organisation of certain parts of the United Kingdom Atomic Energy Authority* (Cmnd. 338) was published on December 14, 1957, and the report on the *Organisation for Control of Health and Safety in the United Kingdom Atomic Energy Authority* (Cmnd. 342) on January 8, 1958. The full report of the third committee—the technical evaluation committee—is not expected until later this year.

The report of the Organisation Committee dealt principally with matters of internal organisation.

The report of the Health and Safety Committee contained recommendations on the co-ordinating of functions of Government departments.

The committee considered that there was an urgent need to clarify the relations between the many Government departments concerned with health and safety in the atomic energy field, and to strengthen the co-ordination between them. The Atomic Energy Office should be built up to enable it to play the leading role and to ensure that all necessary action was initiated in good time. Since the ultimate responsibility for assuring safety in relation to atomic energy must be borne by the Government, it was of vital importance that this major improvement to the machinery should be made.

At present, the following departments are concerned with the control of health and safety in the atomic field.

The Atomic Energy Office is concerned with ministerial responsibility for atomic energy, which is at present vested in the Prime Minister himself; the Ministry of Labour and National Service has specific responsibility for questions of occupational health and safety in premises subject to the Factories Acts; the Ministry of Housing and Local Government and the Ministry of Agriculture, Fisheries and Food have responsibilities for environmental aspects of public health (clean water and clean air); the Home Office and the Ministry of Transport for questions arising from the transport of radioactive and toxic materials; the Ministry of Health for hazards arising from the medical use of radioactive substances and apparatus producing radiation; and the Office of the Lord President has responsibilities in relation to the work of the Medical and Agricultural Research Councils.

The Government is provided with expert advice on radiation hazards by the Medical and Agricultural Research Councils and by the Radioactive Substances Advisory Committee. This committee advises Ministers on the administration of the Radioactive Substances Act, 1948, which deals with the necessary restrictions on the use of radioactive substances and apparatus producing radiation. The committee, which is provided with a secretariat by the Ministry of Health, is concerned with protection of the general public and also looks into problems arising from exposure of sections of the population to particular hazards. It has been closely concerned with compiling the code of practice for the protection of workers in hospitals in the National Health Service. It appoints expert panels to consider protective measures applicable in various uses of radioactive substances; one such panel has been appointed to review the present legislation governing the discharge of radioactive wastes and to recommend what changes in the law may be required. In all this work the committee is assisted by representatives of the Atomic Energy Authority.

In addition to these general committees, the Ministry of Labour and National Service has established an advisory panel on radiological protection in industry and a committee to advise on the drafting of Factory (Ionising Radiations) Regulations in pursuance of the Factories Acts. The British Standards Institution has sponsored a committee to draft codes of practice for handling radioactive materials in industry. All these independent committees include representatives from the Authority.

(The above summary is based on Commonwealth Survey C.O.I., January 21, 1958.)

On January 21, 1958, the Chairman of the Atomic Energy Authority wrote to the Prime Minister concerning the report of the Organisation Committee, endorsing the principles which the Committee laid down and stating the Authority's intention to implement the recommendations. The Home Secretary stated that he had no reason to suppose that the Prime Minister would dissent from the action proposed by the Chairman of the Authority (580 H.C. Deb. *220–221*, January 24, 1958).

Electricity

Borrowings. New regulations have been made replacing the Electricity (Stock) Regulations, 1948. They make provision for the issue of British

Electricity Stock by the Electricity Council under section 16 of the Electricity Act, 1957, and for the dealing with, transfer and redemption of such stock and British Electricity Stock issued by the Central Electricity Authority under section 40 of the Electricity Act, 1947. (S.I. 1957 No. 2228).

Committee. The Parliamentary Secretary to the Ministry of Power stated that a Committee had been appointed, under the chairmanship of Sir Cecil Weir, "to consider ways in which, by co-operation between the Area and Scottish Electricity and Gas Boards in the performance of their respective statutory functions, the administration of the services of a like kind provided to the public by the two industries might be improved; and to make recommendations" (584 H.C. Deb. *14,* March 10, 1958).

Consultative Councils. Regulations have been made amending the provisions relating to the chairmanship, terms of membership and proceedings of the councils so as to give effect to the provisions of section 5 and Part I of Schedule 1 and section 14 of the Electricity Act, 1957, and including an additional ground for vacation of office by the chairman of a council (S.I. 1958 No. 1).

Debate. On January 27, 1958, the House of Commons debated the Report and Accounts of the North of Scotland Hydro-Electric Board for 1956 (581 H.C. Deb. 103–166).

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the Electricity Council (H.C. 70 of 1957–58), the North of Scotland Hydro-Electric Board (H.C. 72 of 1957–58) and the South of Scotland Electricity Board (H.C. 73 of 1957–58).

Publication of applications. Regulations have been made under section 34 of the Electricity Act, 1957, setting out the requirements for the publicity to be given to applications to the Minister of Power for his consent to the construction or extension of a generating station under section two of the Electric Lighting Act, 1909, and to the erection of an overhead high voltage electric line under section 10 (*b*) of the Schedule to the Electric Lighting (Clauses) Act, 1899 (S.I. 1957 No. 2227). Similar regulations have been made for Scotland (S.I. 1958 No. 131; and see below p. 185).

Reports. The annual reports and accounts have been published, for 1957, together with the reports of the consultative councils of the North of Scotland Hydro-Electric Board (H.C. 92 of 1957-58) and the South of Scotland Electricity Board (H.C. 105 of 1957–58).

Gas

Committee. See *Electricity* above, this page.

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 71 of 1957–58).

Transport

Charges scheme. Alterations made by order dated January 20, 1958, to the British Transport Commission (Railway Merchandise) Charges Scheme, 1957, have been published (H.M.S.O. 88–811).

Consultative committee. The report has been published of the Central Transport Consultative Committee (Chairman: Rt. Hon. Lord Coleraine) on the proposed withdrawal of train services on the Lewes–East Grinstead Branch Railway (Cmnd. 360).

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the B.T.C. (H.C. 74 of 1957–58).

Provisional order. The B.T.C. Order Confirmation Act, 1957 (6 Eliz. 2. c. ii) received the Royal Assent on December 19, 1957. The Order empowers the B.T.C. to construct railways and to acquire lands and confers further powers.

Transport fund. The final account has been published together with the report of the Comptroller and Auditor General thereon (H.C. 114 of 1957–58; and see [1956] P.L. 390, [1957] P.L. 70).

PARLIAMENT

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates issued its 2nd Special Report (being the observations of the Minister of Defence, the Admiralty, the Secretary of State for War and the Secretary of State for Air, on the 6th Report of the Committee in 1955–56, on Food Supplies of the Armed Forces) (H.C. 31 of 1957–58).

The Committee issued its 3rd Special Report (being the observations of the Minister of Education and the Secretary of State for Scotland on the 7th Report of the Committee in 1956–57, on Youth Service Grants, together with the remarks of the Committee thereon) (H.C. 66 of 1957–58).

The Committee issued its 1st Report (on Police, England and Wales) (H.C. 30 of 1957–58).

Procedure

Private Bills. On January 22, 1958, the House of Commons debated the motion: That this House is of the opinion that effect should be given to the recommendations of the Joint Committee on Private Bill Procedure relating to opposed Private Bills. The motion was, by leave, withdrawn (580 H.C. Deb. 1177–1213).

Select Committee. On January 31, 1958, the House of Commons resolved: That a Select Committee be appointed to consider the procedure in the Public Business of this House; and to report what alterations, if any, are desirable for the more efficient dispatch of such business (581 H.C. Deb. 673–775; see also 580 H.C. Deb. 1248–1249, January 23, 1958).

Standing Orders of the House of Commons, 1957, have been published (H.C. 42 of 1957–58).

Public Accounts Committee (House of Commons)

Reports. The Committee issued a Special Report containing a Treasury Minute on the 4th, 5th and 6th Reports of the Committee of 1955–56; also containing tables setting forth the comparison of audited expenditure with Exchequer issues and the general abstract of the Appropriation Accounts for 1954–55 (H.C. 75 of 1956–57).

The Committee issued a Special Report containing a Treasury Minute on the 1st, 2nd and 3rd Reports of the Committee of 1956–57; also containing tables (as above) for 1955–56 (H.C. 67 of 1957–58).

The Committee issued its 1st Report (on Excess Votes) (H.C. 106 of 1957–58).

Statutes

Royal Assent. The New Towns Act, 1958 (6 & 7 Eliz. 2, c. 12) (see above p. 164), and the Cayman Islands and Turks and Caicos Islands Act, 1958 (6 & 7 Eliz. 2, c. 13) (see below p. 193), received the Royal Assent on February 20, 1958; the Overseas Service Act, 1958 (6 & 7 Eliz. 2, c. 14) (see above p. 164), the Overseas Resources Development Act, 1958 (6 & 7 Eliz. 2, c. 15) (see below p. 192), and the Commonwealth Institute Act, 1958 (6 & 7 Eliz. 2, c. 16) (see below p. 192), received the Royal Assent on March 13, 1958; the Nationalised Industries Loans Act, 1958 (6 & 7 Eliz. 2, c. 19) (see above p. 180), received the Royal Assent on March 26, 1958.

PUBLIC AUTHORITIES

Bank of England

See above p. 165.

Herring Industry Board

Accounts have been published of sums received and paid out of the Herring Marketing Fund and of receipts and payments by the Board together with the report of the Comptroller and Auditor General thereon; and audited statements with respect to the application of moneys advanced to the Board (H.C. 61 of 1957–58).

Iron and Steel Holding and Realisation Agency

Report and statements of accounts have been published for 1956–57 (H.C. 80 of 1957–58).

National Parks Commission

Report has been published for 1956–57 (H.C. 28 of 1957–58).

Public Service Vehicles

Report. The summary of annual reports for 1955–56 of the licensing authorities has been published (H.M.S.O. 55–181–0–56).

Wheat Commission

Dissolution. The Agriculture Act, 1957 (Appointed Day) (No. 2) Order, 1957, brought into operation on November 30, 1957, preparatory to the dissolution of the Wheat Commission and the repeal of the Wheat Acts, 1932 to 1940, subsection (2) of section 10 of the Agriculture Act, 1957, so providing for the payment to the Minister of Agriculture, Fisheries and Food of any money then standing to the credit of the Wheat Fund and transferring to him any other assets and any liabilities and obligations of the Wheat Commission constituted under the Wheat Act, 1932. The accounting provisions relating to the Wheat Fund having been complied with, an Order has been made dissolving the Wheat Commission on January 31, 1958. By virtue of this Order and of the provisions of sections 10 and 36 of the Agriculture Act, 1957, the Wheat Acts, 1932 to 1940, cease to have effect on the same date (S.I. 1958 No. 125).

PUBLIC HEALTH

Regulation

Air pollution. Certain provisions of the Clean Air Act, 1956, were brought into operation by the Clean Air Act, 1956 (Appointed Day) Order, 1956. An order has been made bringing into operation on the 1st day of June, 1958, the remaining provisions of the Act including provisions relating to the prohibition of dark smoke from chimneys, measures for dealing with grit and dust from furnaces, abatement of smoke nuisances and the application of the Act to railway engines, vessels and Crown premises. (S.I. 1958 No. 167; for debate, see 582 H.C. Deb. 1347–1370, February 19, 1958).

REMEDIES

Certiorari and Declaration

Availability. "I take it to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words. . . . It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency . . . It applies to administrative acts as well as judicial acts whenever their validity is challenged because of a denial of justice, or for other good reason: " *per* Lord Denning in PYX GRANITE CO. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT. See below, this page.

See also BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD (below p. 191).

SCOTLAND

See COMPULSORY PURCHASE (above p. 163); LOCAL GOVERNMENT (above p. 167); NATIONALISED INDUSTRIES, **Electricity** (above p. 181); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS, **Town and Country Planning (Scotland)** (below p. 191).

SUBORDINATE LEGISLATION

Emergency Laws

Replacement. A memorandum by the Secretary of State for War has been published on the replacement of certain emergency legislation by the Land Powers (Defence) Bill (Cmnd. 352).

Parliamentary proceedings

Select Committee on Statutory Instruments (*House of Commons*). On January 28, February 11 and 25, March 11 and 25, 1958, the Committee considered 46, 17, 15, 13 and 20 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for memoranda from Government Departments in respect of 9 instruments.

In their Second Report drew the special attention of the House to the Electricity (Publication of Applications) (Scotland) Regulations, 1958 (S.I. 1958 No. 131) on the ground that their purport called for elucidation. (H.C. 11–IV, V, VI, VIII, IX).

The Committee issued a Special Report, being the first such Report since H.C. 7–XXI of 1953–54. The Report states that in the three sessions 1954–55, 1955–56 and 1956–57, the number of instruments examined was 273, 581 and 449 respectively, and the number brought to the special attention of the House was 1, 6, and 5 respectively. The Report also refers to drafting, explanatory notes, preambles, schedules, tables of contents, references to Secretaries of State, and retrospection (H.C. 11–VII).

Special Orders' Committee (*House of Lords*). In the Fourth Report the Committee examined three instruments and found that none raised important questions of policy or principle, that all were founded on precedent and could be passed without special attention or further special inquiry (H.L. (34) of 1957–58).

TOWN AND COUNTRY PLANNING

Authorised development

A company had the right to quarry in two areas in the Malvern Hills by virtue of the Malvern Hills Act, 1924, which by section 54 provided: " The heads of agreement as set forth in the Fourth Schedule to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern Council and the provisions of this Act shall only apply . . . subject to the provisions of the said heads of agreement." The heads of agreement contemplated that an agreement should be executed and in 1925 a deed was executed by the parties by which the company agreed not to quarry in any part of the hills except their freehold property and some twenty-three acres of licensed land. In 1949 and 1953 the Minister refused the company permission to develop part of their land and granted permission to quarry other parts subject to conditions. The company claimed declarations that the proposed development was "authorised by [a] . . . private Act of Parliament" within Sched. I, Class XII, of the General Development Order of 1950 (S.I. 1950 No. 728) and therefore did not require permission, and that the conditions imposed by the Minister under section 14 of the Act of 1947 were invalid. *Held* (1) (Hodson L.J. dissenting) that the jurisdiction of the High Court to grant a declaration was not to be taken away except by clear words and there was nothing in section 17 of the Act of 1947 to bar recourse to a declaration; (2) (Morris L.J. dissenting) that the heads of the agreement which was replaced by the deed authorised the development, but the Act of 1924 did not, and therefore permission of the planning authority or the Minister was required; (3) that although in a proper case the company would have been entitled to a declaration, in the circumstances the conditions imposed by the Minister were valid: PYX GRANITE CO. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A. (distinguishing *Barraclough* v. *Brown* [1897] A.C. 615; applying *R.* v. *Midland Ry.* (1887) 19 Q.B.D. 540; *Francis* v. *Yiewsley and West Drayton U. D. C.* [1957] 2 Q.B. 136.

Central Land Board

See above, p. 164.

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

The recommendations of the Report of the Committee on Administrative Tribunals and Enquiries, so far as they have been accepted by the Government, have begun to be put into effect.

Circulars

Circular No. 58/57 of the Ministry of Housing and Local Government concerns valuation courts. The Committee thought it undesirable that valuation courts should be composed almost entirely of local authority members and also proposed that the chairman of the court should be independent of any local authority. In the Circular it is stated that the Minister attaches great importance to maintaining the principle of unpaid and voluntary service, and he does not think it right to suggest any change in the appointment of chairmen. He accepts, however, the desirability of increasing the number of non-local authority members and suggests that appointing authorities "might work towards recruiting up to half the members of the panel from outside the membership of local authorities." He also commends the recommendation that members of local authorities should be debarred from hearing cases relating to property within the electoral areas which they represent or in which they live, and he asks the chairmen of courts to observe the spirit of this recommendation in constituting the courts.

Circular No. 9/58 of the Ministry of Housing and Local Government deals with the accepted changes, in administrative procedures involving an inquiry, which do not need legislation. The Circular relates to inquiries held on behalf of that Ministry into compulsory purchase and clearance orders and to those under Part III of the Town and Country Planning Act, 1947. A separate Circular is to be issued about development plans. The Circular provides as follows (paragraph numbers as in the Circular):

Procedure before an inquiry

4. The Committee recommend that acquiring and planning authorities should be required to make available, in good time before the inquiry, a statement in writing giving full particulars of their case. The Government have accepted this recommendation in principle; and this is one of the recommendations to which it is proposed to give effect in due course by

rules of procedure. In the meantime however practical effect can be given to the recommendation by administrative means, and the Minister invites local authorities to make arrangements on the following lines.

5. When a local authority is proposing to acquire land compulsorily, it should prepare a statement in writing setting out clearly the reasons for its proposals, and should make this written statement available to those affected as early as possible so that they will be better able to prepare and present their case. It is desirable that the statement should accompany the statutory notice of the proposal to persons with an interest in the land. A copy should ordinarily be furnished to any other person who lodges a written objection.

6. In the case of clearance and compulsory purchase orders made under Part III of the Housing Act, 1957, a local authority is already under a statutory obligation (paragraph 3 (4) of the Third Schedule and paragraph 5 (3) of the Fifth Schedule) to serve on any objector who claims that his house is not unfit a notice stating the main grounds on which unfitness is alleged. For a compulsory purchase order under Part III, therefore, it will be sufficient for the statement in writing, in addition to setting out the authority's reasons for the acquisition both of the houses in the clearance area and of any adjoining land included in the order, to deal in general terms with the condition of the unfit houses in the clearance area. No new arrangement is necessary for clearance orders.

7. In planning cases Article 5 (9) (*a*) of the General Development Order, 1950, already requires the planning authority to state its reasons in writing when it decides to refuse an application or to grant permission subject to conditions. It is important that this statement should be full enough to give the applicant adequate understanding of the reasons for the authority's decision. For example, it is not ordinarily sufficient to say merely that the development "would be injurious to amenity" or would "be contrary to the provisions of the Development Plan." In the former case, it should be explained what is the amenity that would be injured; in the latter precisely what provisions in the Plan are involved and how they apply.

8. When the applicant has notified his intention to appeal, and desires to be heard, it may be that the local planning authority will need to amplify the reasons already given to him for the decision. At this stage it is essential that the applicant should know, as fully as possible, what is the case he has to meet. If, for example, the authority has taken account of any Ministerial statement of policy or of any Departmental circular in coming to its decision that should be explained—with a reference which will enable the applicant to look it up for himself. Indeed, the more clearly that authorities can explain their reasons at the outset the better; but if they do not find it practicable to supply a full statement when giving their decision they must do so in good time before an inquiry. They are also asked to furnish as full a statement as possible where the inquiry is arranged following an appeal against failure to issue a decision within the statutory period. It would be helpful if a copy of any statement furnished to the appellant under this paragraph could be sent to the Ministry of Housing and Local Government.

9. Apart from the formal procedures referred to above, the Committee recommended, and the Government agree, that in acquisition cases it is desirable that local authorities should as far as possible give early notification of their proposals to those with a statutory interest in the land: and that in planning cases, where the application cannot be immediately accepted as it stands, the local planning authority should be ready to authorise its officers to discuss the application with the applicant before giving a decision, wherever this can usefully be done. The Minister believes that these recommendations follow what is already the fairly general practice of local and planning authorities, but he asks that every authority should consider whether it cannot

improve on its present practice. Much time might be saved if authorities could do more to explain to applicants the reasons why particular proposals are not acceptable.

10. Where, by the Minister's direction under section 15 of the Town and Country Planning Act, 1947, a planning application is referred to him for decision, the General Development Order, 1950, provides that the local planning authority shall serve on the applicant notice of any reasons given by the Minister for issuing the direction. The Minister will normally indicate in his statement of reasons the main points which, on the information then before him, appear to be relevant. This too should be forwarded by the authority to the applicant for guidance in presenting his case.

Procedure at inquiries and hearings

11. In due course a code of procedure at inquiries will be embodied in rules made after consultation with the Council on Tribunals. In the meantime, no alteration of existing practice is proposed.

12. It is contemplated that the proposed code will put a formal obligation on the initiating authority to explain its proposals fully at the inquiry and support them by oral evidence. Meanwhile authorities are asked to secure that those representing them at inquiries do everything they can to ensure that their proposals or objections are fully understood and properly supported.

Departmental witnesses

13. Where the Minister is himself the initiating authority, he will make available a statement in writing before the inquiry, and a representative from the Department will be available at the inquiry to explain the proposal and to answer questions in elucidation of it. This procedure will also apply where the Minister has issued a direction requiring a planning authority to take a certain course. Similarly, the Minister of Transport and Civil Aviation will make a representative available at the inquiry where planning permission has been refused or conditions imposed in consequence of a direction issued by him under Article 7 of the General Development Order, 1950.

14. Where a Department has expressed positive views for or against a proposal which is the subject of an application, and those views form part of the authority's case and are referred to as such in the written statement furnished by the authority, a representative from the Department will attend the inquiry and be available to give evidence if the appellant (in the case of a planning inquiry) or any owner, lessee or occupier of land who may be affected (in the case of a compulsory purchase order) has, on receiving the statement, asked for the presence of such a witness at the inquiry.

15. For example, if a planning authority's decision to refuse an application is based either wholly or partly on advice from the Ministry of Agriculture, Fisheries and Food, and if in its written statement of reasons it includes this advice, a representative from that Department will be available to give evidence at the inquiry if required by the appellant. In such a case therefore the applicant should be informed, when the authority's written statement is sent to him, that if he should decide to appeal and would wish a representative from the Ministry of Agriculture to attend at any inquiry, it will be necessary for him so to inform the planning authority. The notification to the applicant should explain that such a representative would not be liable to cross-examination on questions of Ministerial policy but only on matters of fact and expert opinion.

16. On learning that the attendance of a Departmental representative is required, the authority should at once notify the Department concerned, sending a copy of the notification to the Ministry of Housing and Local Government.

17. Occasionally the authority itself may wish to have available at the inquiry a representative from the Department whose views form part of the

authority's case and have been quoted as such in the authority's written statement, even if the appellant or objector has made no request for such a representative to be present, and in these cases arrangements will be made accordingly; but it is hoped that this will seldom prove to be necessary.

18. The views of any Department set out in an authority's written statement should either be quoted verbatim from the Department's official letter or be in terms which have been agreed with the Department.

19. Where a Department has not expressed positive views in a particular case (for example, where it has said, if asked for views, that it does not desire to express any), and the authority cannot therefore quote the Department in support of its decision, no representative from the Department will attend to give evidence at the inquiry.

Procedure after inquiries

20. If new factual evidence is brought to the Minister's notice from any source after an inquiry, and in his view it may be a material factor in the decision, he will give the parties an opportunity of commenting on it. If the Minister considers it necessary, the inquiry will be reopened.

Costs

21. No change in the existing practice is proposed at present. Any party is free to ask for costs, but the costs of the parties will not normally be awarded except against a party who has acted unreasonably. In due course the Council on Tribunals will be asked to advise whether any change in the practice is called for.

Minister's decision and publication of reports

22. The letter informing the parties of the Minister's decision will in future, in addition to describing the site and summarising the main points put at the inquiry, state the Inspector's findings and his recommendation (if any) and then give the Minister's decision with reasons. If the Minister does not accept the Inspector's recommendation, the letter will say why. The letter will also state that any recipient may obtain a copy of the Inspector's report if a request for it is made within one month of the date of the letter. These copies will not normally include maps and photographs.

23. Orders under Part III of the Housing Act, 1957, are concerned, primarily, with the question whether individual houses are unfit for human habitation; and statutory provision already exists for objectors who are represented at the inquiry and whose houses are found to be unfit to require the Minister to inform them of the grounds for his decision. The letter conveying the Minister's decision on an Order under Part III of the Housing Act, 1957, will not, therefore, deal in detail with the unfitness or otherwise of individual properties, but it will contain a statement in general terms of the Inspector's recommendations in this respect, and his recommendation on any other issue which may have been raised, *e.g.*, whether a local authority is justified in seeking compulsory powers of acquisition to ensure clearance and redevelopment, and will state whether or not the Minister accepts these recommendations.

Date of operation of the new arrangements

24. The Minister intends that the alterations of practice falling within his responsibility should come into force as from the date of this circular. In particular, the arrangements for publication of reports will apply in respect of any inquiries held from now on, even though the new pre-inquiry procedure will not have been carried out in those cases which reach the inquiry stage in the immediate future. The Minister asks authorities to adjust their procedures, to whatever extent may be necessary, so as to enable them to act on the advice given in this circular with the minimum of delay.

25. The Committee said that three characteristics should mark these administrative procedures:—openness, fairness and impartiality. The Government entirely agree, and they are confident that local authorities will too. These objectives cannot be entirely comprised in a set of rules, and authorities are asked to take every opportunity to see that, where the prescribed rules and recommendations do not cover particular circumstances, the proceedings which concern them are carried out openly and fairly. Anyone whose interests are affected by decisions or proposals of an authority and who wishes to exercise his rights to object or to appeal should know in full the case he has to meet.

26. At the same time, in many of the issues with which local authorities are concerned the objector or appellant wants a procedure which need not involve him in heavy expense, which is reasonably informal and which above all will produce a decision quickly. The time taken in reaching decisions (both the authority's initial decision and the Minister's decision on appeal or objection) is already in many cases inconveniently long, and this does much to bring the procedures into discredit. The Minister is anxious that the changes in procedure should not increase the time if that can possibly be avoided. Indeed he wants decisions to be speeded up. He has been making efforts to reduce the time taken in reaching his decisions, and these efforts will continue. He asks local authorities to do the same. However much the existing arrangements can be improved, a case to which objection is raised or which goes to appeal and is the subject of an inquiry is bound to take some time. There are however many cases which are quite straightforward but for one reason or another are not dealt with promptly. The Minister would be grateful if planning authorities could review their arrangements to see whether anything more could be done to enable a quick decision to be given in a straightforward case. (End of Circular.)

Legislation

Some of the changes requiring legislation are contained in the Tribunals and Inquiries Bill (H.L. Bill (46)). Clause 1 provides for the appointment by the Lord Chancellor and the Secretary of State for Scotland of an advisory Council on Tribunals to keep under review the constitution and working of the tribunals listed in the First Schedule, and to report on particular matters referred to it relating to any tribunals (other than the ordinary courts) or to administrative procedures involving an inquiry or hearing. The Council will have a Scottish Committee to consider Scottish tribunals and procedures. The Council may make general recommendations on the membership of tribunals listed in the First Schedule (Clause 4) and must be consulted by the rule-making authority on rules of procedure for them (Clause 7). The Bill also confers on the Lord Chancellor or the Lord President of the Court of Session responsibility for Chairmen of tribunals who up till now have been appointed by Ministers (Clause 3), and requires the Lord Chancellor's or Lord President's consent to the dismissal of members of tribunals (Clause 5). Chairmen of certain appellate tribunals are required to have legal qualifications (Clause 6). Clause 8 provides for appeal on a point of law from decisions of certain tribunals to the High Court or Court of Session. Clause 9 empowers the Lord Chancellor and the Secretary of State to extend the provisions of the Bill to additional tribunals. Clause 10 removes statutory bars to the supervisory jurisdiction of the High Court and Court of Session. Clause 11 repeals certain restrictions on appeals from the Court of Session to the House of Lords.

Disciplinary bodies

Solicitors' Disciplinary Committee. Rules have been made by the Committee constituted under the Solicitors Act, 1957, revoking and re-enacting with minor amendments the Solicitors (Disciplinary Proceedings) Rules, 1942, as amended. The rules regulate procedure for the making, hearing and determination of applications or complaints under the Act (S.I. 1957 No. 2240).

National Health Service

Appeals to Ministers. The plaintiff was a consultant at a hospital which came under the control of a regional hospital board by virtue of the National Health Service Act, 1946. His continued employment was subject to the terms and conditions of service contained in a letter issued by the Minister of Health to all whole-time officers. By clause 16 of the terms and conditions a consultant, who considered that his appointment was being unfairly terminated, could submit his case to the Minister whose duty it was to refer the case to a professional committee for advice, after which he could confirm the termination, direct reinstatement or arrange some third solution agreeable to the parties. That procedure was to be completed before the board's decision to terminate was carried into effect. The plaintiff, having refused to sign a permanent contract on the terms offered by the board, was dismissed and the Minister refused to hear an appeal under clause 16 on the ground that the plaintiff was not, at the time of his dismissal, employed under a contract incorporating those terms and conditions. The plaintiff claimed against the board and the Minister a declaration that his employment was subject to the terms and conditions issued by the Minister; damage for breach of contract or wrongful dismissal, and a declaration that the Minister was in breach of his duty under the Act of 1946 in failing to entertain the appeal. *Held* (1) that clause 16 was incorporated in the plaintiff's contract of employment and the termination of his employment before the terms of that clause had been complied with was a breach of contract by the board; (2) that the plaintiff's contract was one between master and servant and he was not, therefore, entitled to a declaration that his employment had never validly been determined, but only to damages for breach of contract; (3) that the Minister in refusing to hear an appeal was in breach of his statutory duty and the plaintiff was entitled to a declaration to that effect: BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD [1958] 1 W.L.R. 181; [1958] 1 All E.R. 322, Barry J. (distinguishing *Vine* v. *National Dock Labour Board* [1957] 1 Ch. 137).

Town and country planning (Scotland)

Bulletin of selected appeals decisions No. 2 has been published (H.M.S.O. 49–383–2).

Transport Tribunal

Proceedings have been published in the matter of the application of the British Transport Commission 1956 No. 9, 1957 No. 10, to confirm the B.T.C. (Harbours) Charges Scheme Nos. 1 and 2, 1st, 2nd and 3rd Days, March 17, 18 and 19 (H.M.S.O. 88–813–1, 2, 3); also in the matter of application 1956 No. 10, to confirm the B.T.C. (Inland Waterways) Charges Scheme, 1st, 2nd and 3rd Days, March 24, 25 and 26 (H.M.S.O. 88–812–1, 2, 3).

WALES

Advisory Committee

Water. The Minister of Housing and Local Government stated the names of the members of the Welsh Advisory Water Committee (Chairman: L. O. Owen) (581 H.C. Deb. 218, February 7, 1958).

WIRELESS AND TELEVISION

Independent Television Authority

Account of the sums issued to the Postmaster-General out of the Consolidated Fund and of sums received by him and paid into the Exchequer during 1956–57 in respect of advances to the Authority has been published; together with the report of the Comptroller and Auditor General thereon (H.C. 101 of 1957–58).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS, **Civil Service** (above p. 164).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Commonwealth Institute. The Commonwealth Institute Act, 1958 (6 & 7 Eliz. 2, c. 16), received the Royal Assent on March 13, 1958. Its primary purpose is to provide for the vesting in the Trustees of the Imperial Institute of a new site for the Institute, and for the erection by them of a new building. The Act also changes the name of the Imperial Institute to the Commonwealth Institute.

Overseas resources. The account of the receipts and payments of the Secretary of State for the Colonies in respect of the Colonial Development Corporation for 1956–57 has been published together with the report of the Comptroller and Auditor General thereon (H.C. 62 of 1957–58).

The Overseas Resources Development Act, 1958 (6 and 7 Eliz. 2 c. 15) received the Royal Assent on March 13, 1958. Its purpose is to define the extent to which the Colonial Development Corporation may operate in colonial territories after they have become independent and in independent Commonwealth countries generally. The Act also increases the amount of capital available to the Corporation (see also [1957] P.L. 371–372).

Antigua

Report, The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Barbados

On January 2, 1958, the Cabinet system of government was inaugurated in Barbados.

Under the new arrangements the general direction and control of government in internal matters will pass from the full Executive Committee, under the Governor's chairmanship, to a Committee of Ministers, or Cabinet, meeting without the Governor under the chairmanship of the Premier. The Executive Committee in Barbados is the equivalent of the Executive Council elsewhere. The Cabinet will be composed entirely of members of the majority party in the legislature. The one member of the Legislative Council (the nominated legislative chamber) who is also a member of the Executive Committee will be a Minister without portfolio. The full Executive Committee may, however, still meet at the request of either the Governor or the Premier. When it does, the Governor will normally be bound by convention to accept in legislative matters the advice of Ministers. The " personnel " side of the public service will remain the responsibility of the Chief Secretary, and so will internal security. (Commonwealth Survey, C.O.I., January 7, 1958.)

Bechuanaland

Report. The Colonial Report, 1956, for the Protectorate has been published by the Colonial Office.

Bermuda

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Brunei

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Ghana

Emergency powers. In December, 1957, the Ghana National Assembly passed the Emergency Powers Bill, a precautionary measure designed to enable the Government to deal with any emergency that might arise in the country. The new Act introduces no principles not already recognised, and confers upon the Ghana Government no powers that it did not already possess under the United Kingdom Emergency Powers Orders in Council of 1939 and 1956. When Ghana became a fully self-governing member of the Commonwealth in March, 1957, the constitution provided that these existing emergency powers should be retained for a maximum period of one year, during which they should be replaced by permanent legislation.

The Emergency Powers Act distinguishes three types of emergency: a general emergency applying to the whole country; a local state of emergency; and a limited emergency. The powers in the event of a local emergency are less than those available in a general emergency. In a general emergency the Government may make provision for the detention of persons, and the deportation and exclusion of persons from Ghana. In a local emergency it may only make provision for the detention of any person for the commission of any act in relation to the local state of emergency, and for the exclusion of any person from the emergency area. In a limited emergency there are no specified powers of detention, exclusion or deportation.

The Act provides for the Governor-General to declare, by proclamation, that a state of emergency exists, and whenever a general emergency is proclaimed, if Parliament is not sitting it must be summoned within ten days. All regulations made under the Emergency Powers Act must be laid as soon as is practicable before Parliament, and, unless they are approved by a resolution of the National Assembly within 28 days, they will lapse. A clause provides that, in advance of an emergency, Parliament may approve model regulations which can then be brought into effect if an emergency occurs. (Commonwealth Survey, C.O.I., January 21, 1958.)

Jamaica

The Cayman Islands and Turks and Caicos Islands Act, 1958 (6 & 7 Eliz. 2, c. 13), received the Royal Assent on February 20, 1958. Its purpose is to separate these two groups of islands from the colony of Jamaica and to make fresh provision for their government including the setting up of a separate Executive Council and legislature for each dependency.

Kenya

Constitution. A dispatch sent by the Secretary of State for the Colonies to the Acting Governor of Kenya on February 10, 1958, has been published. It deals with the method of nominating candidates for election to 12 special seats in the Legislative Council, which are being created to provide representation not based on a purely communal electorate; and with the powers, functions and composition of the Council of State which is to be established (Cmnd. 369).

An Order in Council has been made enabling the existing legislature of Kenya to make provision for the election in Kenya to the Legislative Council of six elected members who are Africans in addition to the eight African elected members of the existing Legislative Council, notwithstanding that the constitution of the Legislative Council has not yet been amended so as to provide for the additional elected members. (S.I. 1957 No. 2220.)

Malaya

Judicial Committee. An Order in Council has been made conferring on the Judicial Committee of the Privy Council jurisdiction in respect of appeals from the Supreme Court of the Federation of Malaya and making provision regulating such appeals pursuant to arrangements made between Her Majesty and the Head of the Federation. The Order applies the Judicial Committee Act, 1833, and the Judicial Committee Rules, 1957, subject to the exceptions and modifications set out in the Schedules to the Order, to those appeals. (S.I. 1958 No. 426; for terms of the arrangements see Cmnd. 383.)

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Malta

Constitution. On March 25, 1958, the Secretary of State for the Colonies made a statement on his recent discussions with the Prime Minister of Malta. He said: The plan for integration was accepted in principle by the British Government in March, 1956. Last October and November, in talks with Maltese Ministers, we reached agreement on most of the outstanding points in the detailed plans for integration. Then, on December 30 last, a resolution threatening the severance of ties with the United Kingdom and her allies was passed by the Maltese Legislative Assembly on the initiative of the Maltese Government. In the view of Her Majesty's Government this has done great harm to the relations between the two countries and the future well-being of Malta which the plan of integration was intended to enhance.

In the discussions which have just concluded the Prime Minister of Malta refused to recommend integration to the Maltese people on the imaginative terms proposed by Her Majesty's Government. He attempted to attach a political condition, namely, the right to independence on a unilateral basis, which strikes at the root of a union in mutual confidence which was the basis of the integration proposals. It is impossible for the United Kingdom Government to pledge Parliament to proceed with integration unless a very different state of mind is shown. Her Majesty's Government are, however, prepared to resume discussion with the Maltese Government in order to find a *modus vivendi* pending consideration of long-term arrangements.

At the talks, the Prime Minister of Malta proposed that Her Majesty's Government should immediately enter into further financial commitments of a most extensive character or be ready to grant independence to Malta. He suggested that in implementing the plan for integration the United Kingdom Parliament should undertake that until such time as full economic equivalence was achieved, they would be prepared to grant independence to Malta if a Maltese Government were at any time during that period returned to office with a mandate for that policy. At a later stage he offered to withdraw this proposal, provided that the United Kingdom Parliament were prepared to extend to the Maltese people, at their next election, a choice between integration and independence.

In the circumstances, I revived the tentative suggestion that rather than lose all the fruits of our long negotiations, Her Majesty's Government would be prepared, if the Maltese people so desired, to proceed with interim constitutional and economic arrangements for a period of five years. The essence of this five-year plan would be that Malta would be granted a constitution broadly on the lines of that proposed under the integration plan, save for the time being making Malta part of the United Kingdom and providing for representation at Westminster; the same economic and financial arrangements; and, at the end of the five years, both Governments would consult together to review the working of the constitutional and economic arrangements and to consider whether they could then proceed to the conclusion of arrangements on a permanent basis.

Let me tell the House what our other offers were. In the first place, I made it abundantly clear that there was no question whatever of Her Majesty's Government abandoning Malta and its people, or of their being indifferent to the economic consequences of the effect of defence cuts. I repeated again the assurances already given about the level of employment in the dockyard until 1960 and again confirmed that pending investigation of the possibility of converting the dockyard to commercial use, no decision had been taken about its future thereafter. I repeated that we stood by the economic and financial commitments under the integration plan.

What, in fact, were these? We offered to provide over a period of five years capital assistance of £25 million for diversifying the economy. We offered percentage grants towards the social services costing not less at the start than £1 million a year and with provision for it to rise materially thereafter. We offered additional assistance towards remedial measures in the event of there being, unhappily, substantial unemployment. We offered to set up a working party at once to consider what practical plans could be made in advance to deal with the problems that might arise if, despite the joint efforts of both Governments, there should be substantial unemployment after 1960 owing to changes in defence policy. As to the cost of converting the dockyard to commercial use, we made it clear that this is a separate issue and that it would not affect the arrangements which I have just described.

At our last meeting we discussed the 1958–59 Budget. I said that in the light of our current financial difficulties, our contribution would have to be less than in the present financial year; but we were still ready to provide the very substantial sum of £5 million. In our view and that of independent economic experts, the Maltese Government are fully capable of making a contribution from their own resources, such as raising a local loan. There was, therefore, no reason why the rate of advance in Malta need be slowed down. It was then suggested that there should be a period of three months during which Her Majesty's Government should provide interim financial assistance. The Maltese Government maintained, however, that this should be given without prejudice to the size of the United Kingdom contribution for the whole year and to the question of the Maltese Government making a contribution from their own resources.

It was not, however, possible to agree on the provision of interim financial assistance without prior agreement on these two points, since it would make the United Kingdom taxpayer liable for an unknown deficit which would, in the end, be determined only by the rate of expenditure which the Maltese Government decided to incur. Moreover, Mr. Mintoff maintained that he could not withdraw the resolution unless agreement had been reached at the end of three months on all outstanding issues.

I regret that Mr. Mintoff did not accept Her Majesty's Government's offers. He and his colleagues returned to Malta on March 21. I have felt it my duty to this House and to the people of Malta to inform them of the full undertakings worked out in the negotiations with the Maltese Government to which Her Majesty's Government were prepared to agree.

Following is a summary of the main features of the proposals that have been worked out in negotiations with the Maltese Government:

INTEGRATION PROPOSALS

I. *Constitutional*

It would be provided in legislation that Malta would be comprised in the territories of the United Kingdom and Parliament would be asked to affirm in the legislation that in no event would Malta cease to have this status without the consent of the Maltese Parliament.

Provision would be made for Maltese representation (by three Members) at Westminster and Parliament would affirm that the representation of Malta would not cease without the consent of the Maltese Parliament.

Parliament would also be asked to affirm in the preamble to the legislation that they would not pass laws extending to Malta with respect to which the Maltese Parliament had power to make laws except so far as the United Kingdom Parliament might judge it necessary for the fulfilment of Her Majesty's Government's responsibilities for defence and external affairs and certain other specified purposes.

The new Constitution for Malta would provide for the disappearance of the dyarchy in its present form and for the Governor to act in accordance with the advice of Maltese Ministers in matters within their responsibility.

The Maltese Parliament would have power to legislate on all matters except those specified in a Schedule of excluded matters, of which the main items would be defence and external affairs.

The Maltese Government would have delegated to it certain executive powers in the field of external affairs, notably to negotiate trade agreements with neighbouring countries.

Her Majesty in Council would have power to make provision for Malta by Order in Council with respect to defence and external affairs where such provision is urgently necessary and for a limited period, in order to modify or adapt the law of Malta in those fields.

There would be provision in the legislation for consultative machinery in Malta and London.

The responsible Secretary of State would have certain powers of directing reservation of Maltese Bills affecting Her Majesty's Government's responsibilities for defence or external affairs or certain other specified matters.

II. *Economic*

Her Majesty's Government would approve and support the ultimate aim of the Maltese Government that after a reasonable period of years Malta should reach an economy and standard of living comparable to that of the United Kingdom.

It would be open to the Maltese Government after 12 to 15 years to request that their economy become an integral part of that of the United Kingdom.

The Maltese Government would recognise the obligation of the Maltese people to make sustained efforts to bring the economy of Malta to a level which, taking account of all relevant factors, was comparable to that of the United Kingdom.

A development programme would be drawn up on certain lines in consultation with Her Majesty's Government.

Towards this plan, Her Majesty's Government would as a first step provide assistance for the first five years, as follows:

Capital

A grant of £25 million over the five years.

The good offices of the United Kingdom Government to attract industry to Malta.

Recurrent

A minimum annual contribution of £1 million towards the social services, or more as the case might be, as follows:

(i) Education:—one-third of the annual recurrent expenditure of the Maltese Government if it was less than £1,250,000 or one half if such expenditure were £1,250,000 or more;

(ii) Health:—one-third of the Maltese Government's expenditure;

(iii) Other Social Welfare Services:—one-quarter of the Maltese Government's expenditure.

III. *General*

The above financial arrangements would be reviewed and the United Kingdom Government would be willing to assist the Maltese Government in taking remedial measures to be agreed if, in consequence of any drastic change in Imperial defence policy, the level of unemployment in Malta should reach and for six months remain at a higher level than the rate in the United Kingdom.

A Working Party would be set up at once to consider in advance what plans might be made to deal with such a situation should it seem likely to arise, including the possibility of changes in the arrangements for unemployment benefit and gratuities for men discharged by the Service Departments.

An independent Commission could be set up after two years and would, in any case, be appointed towards the end of the first five years to review progress and to report on possible changes in the above arrangements.

FIVE-YEAR TRIAL PERIOD

I. *Constitutional*

A new Constitution for Malta broadly on the lines of the proposed integration arrangements, save the comprising of Malta in the United Kingdom and representation at Westminster.

II. *Financial*

The same arrangements as under the integration plan.

III. *General*

The same commitments as under the integration plan.

IV. *Final arrangements*

The working of the arrangements in I—III above would be subject to review by both Governments—at the end of the five years in order to see whether agreement could be reached to proceed with more permanent arrangements for the achievement of full integration or for some other agreed constitutional and economic basis for Malta's future (585 H.C. Deb. 227–243).

Mauritius

Electoral Boundary Commission. On February 25, 1958, the Secretary of State for the Colonies said that he had accepted the Report of the Commission with its recommendation for 40 single-member constituencies (583 H.C. Deb. *28–29*; and see [1957] P.L. 187, 374).

Montserrat

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Nigeria

Constitution. The Nigeria (Constitution) (Amendment) Order in Council, 1958, came into operation on April 1, 1958. It amends the provisions of the Nigeria (Constitution) Order in Council, 1954, in a number of respects in order to give effect to certain recommendations of the Nigeria Constitutional Conference held in London in May and June, 1957 (S.I. 1958 No. 429; see also [1957] P.L. 375–379).

Southern Cameroons. An Order in Council has been made amending the Nigeria (Offices of Governor-General and Governors) Order in Council, 1954, in order to provide for the office of High Commissioner for the Southern Cameroons. It also amends the provisions of the Order relating to the exercise of the functions of the Governor-General of Nigeria and the Governors of the Regions by a deputy and the constitution of offices. (S.I. 1958 No. 430).

Rhodesia and Nyasaland

Electoral Bill. On February 18, 1958, the Government provided an opportunity in the House of Commons for discussion of the Federation of Rhodesia and Nyasaland Electoral Bill, which was passed by the Federal Parliament on January 9, 1958, and, under the terms of the Federal constitution, was reserved for the signification of Her Majesty's pleasure.

On this Bill, as on the Constitution Amendment Bill, the African Affairs Board, a standing committee of the Federal Assembly with special responsibility for African interests, reported that it considered it a differentiating measure. The Board's views, together with a memorandum by the Federal Government on the objects of the Bill, were published as a White Paper (Cmnd. 362) on February 11, 1958, and formed a basis for the discussion in the House of Commons.

At the close of the debate, the Opposition's case, that the Bill should not be presented to the Queen for her approval, was defeated by 305 votes to 256 (582 H.C. Deb. 1103–1174, February 18, 1958; see also above p. 102).

Solomon Islands

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Somaliland

Legislative Council. At a meeting of the Legislative Council of the Somaliland Protectorate, held in November 1957, it was unanimously agreed that a commission should be appointed to examine the methods by which the unofficial membership of the Council could be made more representative. The commission has now been appointed by the Governor, and a detailed itinerary is being prepared to enable the members to meet people in all parts of the territory and hear their views.

Somaliland's first Legislative Council, inaugurated in May 1957, consists of the Governor, as president, 3 *ex officio* members, 5 official members, and 6 unofficial members appointed by the Governor (Commonwealth Survey, C.O.I., March 4, 1958).

Trinidad and Tobago

Constitution. An Order in Council has been made to validate the past appointments and membership of certain Nominated Members and the past elections and membership of certain Elected Members of the Legislative Council; to provide with retrospective effect that the payment of certain allowances or of out-of-pocket expenses is not a disqualification for membership of the Council; and to validate certain other things done relating thereto (S.I. 1958 No. 428).

Virgin Islands

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

West Indies

Federation. The new federation in the British Caribbean, to be known as The West Indies, was established on January 3, 1958, when the interim provisions of the Federal Constitution came into effect and the Governor-General, Lord Hailes, arrived in Trinidad, the seat of the federal capital, to take the oath of office.

The federating territories are Barbados; Jamaica; the Leeward Islands of Antigua, Montserrat, and St. Christopher-Nevis-Anguilla; Trinidad and Tobago; and the Windward Islands of Dominica, Grenada, St. Lucia and St. Vincent. Although British Guiana, British Honduras and the British Virgin

Islands have not decided on joining the Federation, the way is open for them to join later.

Federal elections are to be held on March 25, 1958, and the Federal Legislature is to be inaugurated by H.R.H. the Princess Margaret on April 22, 1958. The provisions of the Constitution will then become fully effective. At that stage there will be a Federal Prime Minister, and the Governor-General will be advised by a Council of State consisting of the Prime Minister and ten other Ministers.

The Federal Constitution confers a very considerable measure of internal self-government, but the federation does not at this stage become a fully self-governing Member of the Commonwealth. It is hoped to achieve this goal in due course.

The United Kingdom Government retains power only in respect of defence and external relations, and for maintaining the financial stability and credit of the Federation (Commonwealth Survey, C.O.I. January 7, 1958; see also [1957] P.L. 286, 379–381).

A Mace is to be presented by the House of Commons to the House of Representatives of The West Indies (585 H.C. Deb. 249–251, March 25, 1958).

Zanzibar

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

BOOK REVIEWS

PROTECTION FROM POWER UNDER ENGLISH LAW. By LORD MACDERMOTT, Lord Chief Justice of Northern Ireland. Published under the auspices of the Hamlyn Trust. [London: Stevens & Sons Ltd. 1957. viii and 196 pp. 16s. 6d.].

THE purposes of the Hamlyn Trust are by now well known, and the volumes of lectures which have been sponsored by it provide a lasting contribution to the means whereby the public may understand the nature and value of law. The present stimulating book makes profitable reading for all, for Lord MacDermott draws attention to the principal concentrations of power which conduce to the oppression of the individual. He shows what safeguards the law provides, and he makes countless interesting suggestions for the improvement of that law, to the end that it should preserve public order effectually, stand for what is morally right and enshrine the "rule of law." Although he is concerned primarily with English law, the value of this book is even further enhanced by frequent references to the position under the law of Scotland or of his own jurisdiction, Northern Ireland.

The study is divided into two parts, the first concerning the power acquired by the State, and the second concerning that gained by individuals or organisations not directly connected with the State. In the first part Lord MacDermott deals with the power of prosecution, the power of Parliament and the power of the executive. After considering the history of the courts' attitude towards torture and confession, and also of the Attorney-General's office, he expresses himself for the most part content with the legal position concerning the power of prosecution, and particularly with the independent status and diverse duties of the Law Officers of both England, Scotland and Northern Ireland. (It is curious that he refers to trial by battle on p. 15 as *ordeal* by battle.) He is, however, disturbed about the effects of the sovereignty of the Imperial Parliament at Westminster. It is not so much Parliament he is worried about as the practically unlimited powers it can confer upon individuals. He believes certain kinds of statute need careful watching, namely those conferring an unfettered discretion or a judicial legislative power on a Minister or Department of State, and those which result in burdens or injustices that Parliament did not intend. He condemns the continued use of legislation which is obsolete in the sense that the circumstances relevant to its provisions have changed radically since its enactment; and he believes that the more frequent use of preambles and recitals would help to eliminate the occasions on which Parliament means one thing but says another. Perhaps one of Lord MacDermott's most radical suggestions is on p. 76: "If a real question of law fairly arises in the discharge of a statutory function committed to the executive, there seems no good reason why the cost of resolving it, whatever the result, should not be borne directly by the public purse." Later in the book he treats the cost of all litigation as a grave problem, and one wonders whether, if it were not for the increased burden on the taxpayer, such a suggestion could not be extended to cover all cases where a real question of law arises, particularly if a private litigant finds himself opposed to a rich and powerful company. When the author comes to the power of the executive, he deals with the normal supervisory jurisdiction of the ordinary courts of law, namely through habeas corpus, the prerogative orders, declarations and direct actions. He duly acknowledges the work of the Franks Committee, although he is not here concerned with administrative tribunals, and he goes on to make several useful recommendations himself for reform of these remedies. In particular he advocates the implementation by Parliament and the executive of the *audi alteram partem* principle wherever possible, and the creation of an Administrative Council to help in the formation of administrative standards—a body perhaps not unlike the Franks Committee's Council on Tribunals.

In the second part of the book Lord MacDermott does a considerable service in reminding us that the State does not necessarily provide the most serious threats to the liberty of the individual. He discusses the power of wealth and status, the power of monopoly and restrictive association, and the power of numbers. The first two may be described as powers wielded by the so-called privileged classes, while the third concerns the power of the trade unions. On the whole Lord MacDermott believes the law has come to control the power of wealth and status by means of, for example, the Factories Acts and the legal aid scheme, even though the latter has some notorious defects. Apart from a Statute of Monopolies, 1623, the problem of monopolies and restrictive practices was not really tackled at all seriously until 1948, and it remains to be seen how effective the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, and the Restrictive Trade Practices Act, 1956, are. In the author's view, however, the greatest problem is the power of the trade unions. Most readers must agree with this assessment, for the unions have acquired enormous privileges, parallel in many ways to those enjoyed by the Crown before the Crown Proceedings Act, 1947. These legal privileges are now only kept in check by good sense, but is this enough ? The trade unions could paralyse the country and bring down a Government, and in recent years some ugly incidents have come under the heading of "peaceful picketing." Lord MacDermott suggests some radical legal reforms, including the repeal of trade union immunity from tort actions, and he roundly condemns the closed shop principle, with its likely attendant personal and family hardships. English readers may be surprised to find that a corresponding measure to the Trade Disputes and Trade Unions Act, 1927, is still in force in Northern Ireland.

D. C. M. YARDLEY.

KING AND COMMONS 1660–1832. By BETTY KEMP. [Macmillan. 1957. 168 pp. 16s.]

THE Declaration of Rights of 1689 makes no mention either of the duration of Parliaments or of placemen within the House of Commons. Yet it was upon somewhat uncertain and ill-defined conventions on these two matters that the constitutional balance of the next century and a half depended.

The Septennial Act in no way curtailed the prerogative of dissolution, but it led to something very like such a curtailment. Although its sole legal effect was to set a maximum life to any Parliament, and in this has sometimes seemed to constitutional historians to lie its chief importance, in fact of greater moment was the convention to which its existence on the statute book contributed, that the normal life of Parliament should approach seven years. For this convention added greatly to the counterweight of the Commons in the balance against royal authority. The convention relied on voluntary restraint on the part of the King and his advisers, but the arguments for it were well summarised by the Annual Register in an article reproduced as an appendix in this book. Criticising the dissolution of 1806, it wrote "the exercise of this right tends infallibly to increase the influence of ministers in the House of Commons, and, therefore, were it ever to become the usual practice of our government, for those in office to dissolve parliaments, when not constituted to their liking, those assemblies, influenced by the terrors of a premature dissolution, which is always inconvenient and expensive to their members, would lose all spirit of liberty or resistance, and become the tame and servile instruments of court. If septennial parliaments are found to be of too long duration, it would be better at once to revive the triennial act than palliate the evil by a remedy, which, every time it is repeated, adds to the influence of the crown over the representatives of the people."

The second convention depended on a parallel restraint exercised by the Commons—of "not pressing their desire for independence so far as to exclude all placemen unconditionally from their House." It was this which "preserved the equilibrium by providing the King and his ministers with a method of influencing the Commons without overriding them. This method, the 'patronage system,' not only weakened the Commons in relation to the King but also averted open conflict between them."

Miss Kemp's scholarly study is a careful and interesting account of the development of these two conventions during the eighteenth century and their decline in the nineteenth. The diminution in the amount of crown patronage after 1784 meant that it was no longer invariably the case that a government emerged from an election with a stronger position in the Commons. The old parliamentary balance was replaced by a new one in which the electorate supplanted the King. But there, too, the process was slow and gradual, not being fully accepted until after 1867. And it is this characteristic of gradual adaptation, with those responsible only rarely aware of the long-term implications of what they were doing, which most strikingly emerges from Miss Kemp's valuable work.

H. R. G. GREAVES.

VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By THOMAS REED POWELL. [Columbia: Columbia University Press and London: Cumberlege. xv and 229 pp. Price in United Kingdom: 28s. net.]

THIS book contains the fourteenth series of James S. Carpentier Lectures given at Columbia University in the spring of 1955, and prepared for publication after the death of Professor Powell in the autumn of that year by Professor Freund and Professor Ernest J. Brown, of Harvard.

The lectures are a study of the way in which constitutional issues are really treated by the Supreme Court of the United States. In order, they deal with: i. Establishment of Judicial Review; ii. Professions and Practices in Judicial Review; iii. National Power; iv. Federalism: Intergovernmental Relations; v. State Police Power; vi. State Taxing Power. Professor Powell writes unpretentiously, and his use of anecdote, irony and good plain English gives the book an attractive individual character. Their prodigious ingenuity and technicality, however, make the later lectures hard reading for anyone unfamiliar with American constitutional law.

The purpose of the lectures is to demonstrate the lack of "candor" or "capacity" of anyone who would still agree with the dictum of Mr. Justice Roberts on the role of the Supreme Court: "All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy." But what in fact happens when the court affixes one label or another to an enactment, and so declares it constitutional or void? Like W. W. Cook, Professor Powell says that classification, calling things names, is a matter of choice of law wherever there are competing systems, and so an expression of preference for one way or another of disposing of a case. It is unclear whether this view entails, even in the case of the U.S. Supreme Court, Powell's conclusion that judges legislate.[1] While it is certainly possible to follow the argument in Lectures i–iii, ultimately the problem is how to talk about the activities of the nine men, which require the ability to evaluate Lectures iv, v and vi. Perhaps most British lawyers will have to stand mute in this particular dispute.

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[1] See Geoffrey Marshall, "Political Science and the Judicial Process" [1957] P.L. 139.

This book will be most useful of course to those who can already handle the materials of American constitutional law. It is also a good example of jurisprudence in action, helpful to the practitioner and teacher of law. If the findings of the Franks committee eventually affect the separation of power in this country, then lawyers will have to study much more carefully than they have previously the sort of problem attacked so shrewdly by Professor Powell. Our potted fare of archaic doctrines and forgotten decisions of the Supreme Court has padded us out with catch-phrases and commonplaces. Six hard rounds with Professor Powell could remove a lot of this surplus tissue.

Professor Freund and Professor Brown have done jurisprudence and public law a great service by making sure that this " redaction or distillation " of Thomas Reed Powell's " most characteristic studies " would be preserved in book form.

D. J. BENTLEY.

THE YEAR BOOK OF WORLD AFFAIRS, 1956. Editors: GEORGE W. KEETON and GEORG SCHWARZENBERGER. Assistant Editor: L. C. GREEN. Published under the auspices of the London Institute of World Affairs. [London: Stevens & Sons Ltd. 1956. xii–420 pp. £2 2s.]

THIS tenth volume of the *Year Book of World Affairs* contains a review by Dr. H. A. Smith of the latest edition of Oppenheim's *International Law* wherein these words appear: " What began as a treatise has now become a bibliography . . . In order to consult all the authorities cited upon any important topic the reader must be a competent linguist with the time and money to visit the three or four libraries in Europe where a full range of these books and periodicals is to be found. In these days that is what is really meant by saying that a book has become ' indispensable.' " It is respectfully submitted for the consideration of the editors of the *Year Book*, as they stand at the threshold of their second decade, that these words might without injustice be applied in criticism of their own product. For the latter has come to consist in a series of papers, some weighty, some less weighty, and in a series of " Reports on World Affairs " which are reports merely on the literature of various aspects of international studies in the course of which there is surveyed a quite fantastic number of books and papers. These " reviews " but seldom tell one what the work alluded to—for it is often no more than allusion—is about. But they do indeed make fascinating reading. One feels one should have read them all.

Having said this, the present reviewer begs to draw attention, by recital of their titles only, to three rather interesting papers in the volume: Professor Alexandrowicz' " India's Himalayan Dependencies," Mr. Miller's " Commonwealth Conferences 1945–1955 " and Professor Friedmann's " Limits of Functionalism in International Organisation."

A special feature of the volume is a Consolidated Index of volumes 1–10 of the series. And another special feature is Professor T. J. B. Spencer's " Report on Contemporary Literature." This is " an account of books of general literature which may be of interest to the student of international relations," the books surveyed ranging from *The Quiet American* to Professor Butterfield's *Man on his Past*. One can understand, and indeed welcome, those parts of this " Report " which illustrate such propositions as that " There can be no doubt that the atomic menace dominates the imagination of many serious writers," or that " The African colour-problems have again attracted writers of fiction." The inclusion of reviews of the collected poems of Wallace Stevens and Dr. Merill Moore is less easy of understanding. One would have thought these works had no international significance. Perhaps that is Professor Miller's point. For he says, of verse in this century, "it has become a specialism as it has never been before."

CLIVE PARRY.

ANNUAL SURVEY OF SOUTH AFRICAN LAW 1956. By THE FACULTY OF LAW OF THE UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG. [Cape Town: published for the Faculty by Juta & Co., Ltd. 1957. xiii and 450 pp. 48s.]

THIS admirable survey is now in its tenth year and the anniversary is celebrated in a felicitous foreword by Mr. Arthur Suzman, Q.C. It gets even better as it grows older and is indispensable to those of us who try to keep in touch with developments in a legal system which becomes increasingly inaccessible as more and more judgments are delivered and reported only in Afrikaans.

Readers of this Journal will be mainly interested in the three first sections on Constitutional Law, Administrative Law and Local Government. The first of these completes the story of the constitutional crisis produced by the determination of the Nationalist Government to remove the Cape Coloured voters from the common electoral role. The judgments of the bench of the Cape Provincial Division and of the Appellate Division in *Collins* v. *Minister of Interior* (upholding the Senate Act, 1955, and the S. Africa Act Amendment Act, 1956, and thereby allowing the Government to attain its object) are subjected to a detailed analysis by Professor Ellison Kahn. The other principal feature of these sections is a summary of the year's legislation implementing the *apartheid* policy.

L. C. B. GOWER.

ASPECTS OF ENGLISH EQUITY. By SIR RAYMOND EVERSHED, M.R.

ONE HUNDRED YEARS OF LIMITED LIABILITY COMPANIES IN ENGLAND. By the RT. HON. LORD COHEN OF WALMER. [Jerusalem: Magnes Press and London: Oxford University Press. 1954 and 1957. 52 and 43 pp. 5s. and 6s.]

THESE pamphlets contain the second and third series of the Lionel Cohen Lectures of the Hebrew University of Jerusalem. It need hardly be said that both are authoritative and thoughtful accounts of their respective subjects. Lord Evershed's perceptive lectures illuminate the past, present and future roles of the English equity jurisdiction and will be invaluable to all students of that subject. Lord Cohen's summary of developments during a century of limited liability is a useful addition to the meagre literature on the modern history of Company Law—a history to which Lord Cohen himself made a notable contribution as Chairman of the last Committee on Company Law Amendment.

L. C. B. GOWER.

PUBLIC LAW

Autumn, 1958

COMMENT

WHEN the theory and the practice of the Constitution diverge, the advantage often lies with the executive at the expense of those bodies whose function it is to control governmental power. A Member of the House of Commons recently sought to have debated a motion on the "personal powers, capacities and previous training which influence the selection and appointment of chief constables, having regard to their far-reaching authority and their relations with Her Majesty's inspectors of constabulary and the public in general"; but he was ruled out of order. The Speaker said: "The crux of the hon. Member's difficulty is that the control of local police forces and chief constables is in the hands of the local authority. . . . The Home Secretary's powers do not include responsibility for local police forces." The last sentence must have raised eyebrows. "Did I understand you to say," asked one Member of some experience who may have wanted to get the record a little straighter, "that the Home Secretary was the Minister responsible to the House for police forces generally, but that he had no responsibility for the powers of chief constables?" The Speaker elaborated but not perhaps to the effect the Member hoped: "The Home Secretary has certain powers. For example, he has to approve the appointment of a chief constable, but the selection is made by a county council or other local authority. He has certain appellate jurisdiction in disciplinary cases, that is to say, if a chief constable is dismissed by a county council or other local authority, the appeal lies to the Home Secretary. He has control of Her Majesty's Inspectors of Police, who report to him, under statute, to make sure that local police forces are efficiently conducted so as to enable the Home Secretary to authorise the grant from central funds, which, I think, is 50 per cent., to the police funds all over the country. However, beyond that he has no power. He has no power in day-to-day administration of a county police force or other local authority police force. That lies in the hands of local councillors, who are elected persons, and, ultimately, in the hands of local government electors."

There are minor peculiarities in this description. The selection of the chief constable is not made, in a county area, by the council, but by the standing joint committee which consists, as to half its membership, of local justices. The power to make police regulations extends to " the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces " and is more extensive than is suggested by the words " to make sure that local police forces are efficiently conducted."

But, above all, the idea that local councillors and, ultimately through them, local government electors, have power in day-to-day administration of police forces, is constitutional theory run to seed. In county areas, it is only half true in theory; in any area, it is almost entirely false in practice. The truth is that police forces are among the most authoritarian, and least controlled by democratic processes, of the public services of the country. This may or may not lead to their greater efficiency and may or may not be in the public interest.

The hybrid position of the police—who are neither local nor central authorities—leads to other anomalies, as every first-year student knows. The local authority is not vicariously liable for the acts of a police constable in (at least) many of his functions, because of the considerable control exercised by the Home Secretary. The Crown is not vicariously liable, because the police are not paid and appointed by the Crown, within the terms of the Crown Proceedings Act, 1947.

The limitation on parliamentary control of the police may be thought unfortunate. Opinions differ sharply whether the House of Commons has acted wisely or foolishly in limiting its definition of the nature and extent of privilege in the *Strauss* case. Certain Members had clearly felt, in earlier debates on privilege matters, that the House was in danger of making itself look foolish by its insistence on its rights of protection. But there is surely a strong argument that letters from Members to Ministers are an essential part of the democratic parliamentary process and that the more formal methods of question and debate in the Chamber are merely that part of the iceberg which appears above the surface. Those who believe that increased governmental activity is an inevitable consequence of social and economic complexity should be reluctant to weaken the processes of control.

The most recent development in the newest experiment in control has been taken a stage further by the publication of the second report from the Select Committee of the House of Commons on Nationalised Industries. The subject of the report was the National Coal Board about which, claimed the Committee, they received more information than the House had ever yet had on the workings of a nationalised industry. The Committee took evidence from the Chairman and

Deputy Chairman of the Board, from the Permanent Secretary and a Deputy Secretary of the Ministry of Power, and from Mr. Grant, the Committee's " liaison officer " at the Treasury. On their attitude to their functions, the Committee reported that they " do not refrain from criticism when they think that, on the evidence, it is called for; but they have tried not to become involved as critics with the day-to-day administration of the Board on the one hand, and with matters of Government policy on the other." Perhaps the Committee have already begun to fulfil one of the more starry-eyed of their purposes: that of being a forum where the nationalised industries could defend themselves, for, as a Board representative said, it was " desperately important . . . that we should have the opportunity of expressing our point of view." So, concluded the Committee, in tones of avuncular satisfaction, the inquiry " gave the Board the chance to state their case fully and clearly. The witnesses seized their opportunity and . . . made full use of it. In the early stages of the inquiry, perhaps due to their inexperience of the procedure, the witnesses appeared to be unduly on the defensive, but in later sittings a better understanding developed. The Committee consider that the substantial amount of time spent in giving evidence and preparing memoranda will prove of value to the Board, and that this kind of inquiry is not prejudicial to the good administration and direction of the affairs of nationalised industries."

This is more than a little smug. It might also be helpful to have a report from the Coal Board on the value of the Committee's inquiry and the attitude of its members. It is not only the nationalised industries which are on trial in this experiment.

The extent of Ministerial influence in matters of detail becomes clearer from this Report. The annual investment programme of the Board is, of course, agreed by the Board and the Minister. But " the interest of the Ministry does not by any means end there. Through regular meetings with the Board and its officials, the investment programme and its progress are kept under continuous review. Production figures might be discussed weekly. Discussions on all problems continue daily." The Permanent Secretary to the Ministry said in evidence: " My colleagues who are concerned particularly with coal in the Ministry are . . . in daily contact not only on the investment programme, but on all their problems."

The Report also sets out the relation between the price of coal and the Minister. The only statutory sanction for Ministerial control of price is under Defence Regulations and affects only 15 per cent. of the total sales. But under the " gentleman's agreement," the Board have agreed not to raise their general level of prices without Ministerial approval. This has sometimes made difficulties for the

Board; and the Committee noted that it might seem to be at odds with the Board's statutory obligation to break even over the years. The Committee recommended that this procedure should be made more formal and that the Minister should have a statutory power in the national interest to give specific directions on prices, which should be laid before Parliament and published.

After the publication of the Committee's Report and on the day of the publication of the Robson Committee on Coal Distribution Costs, the Government announced the end of a different control: that over the price of house coal to the consumer. But the " gentleman's agreement " is to remain at least for the present. The " private sector " and the " public sector " meet within the same industry. The Minister will continue informally to control the price at which the public corporation sells its product to the retailer but will have no control over the price at which the retailer sells to the consumer. Here is a pretty picture of the working of economic and political theory: Government control over a monopoly producer and *laissez-faire* applied to retailers in competition. Parliament, however, seems to have been left out of the party.

Closely connected with these problems is that of control over maladministration in public authorities. Inefficiency, injustice, clumsiness, dishonesty short of corruption or criminal offence—all these come to light from time to time. And the methods of complaint and remedy are neither obvious nor particularly effective. Letters to Members of Parliament, letters from Members to Ministers, questions, debates, letters to the newspapers—all valuable, all rather haphazard, all a little daunting to the man in the street. The attitude of the small man who feels he has been unfairly treated is not always understood by professional champions. He considers the possibilities. He might take legal advice and perhaps go to the courts; but he doubts their sympathy, fears the cost, and above all cannot produce what the courts regard as facts. He might write to his M.P. or the Press; but the former is not equipped (or so he feels) to force out the facts and the latter's methods may not bring his remedy nearer.

Some believe that a solution lies in the creation of a new type of court, perhaps not unlike the *Conseil d'Etat*, which would also have jurisdiction to hear appeals from administrative tribunals and other bodies. This opinion is in tune with the general movement for the judicialisation of the administrative process. It has many attractions. But an alternative is suggested by the article of Professor Hurwitz printed in this issue. Its English parallel would be the creation of a high-ranking officer of Parliament, of the status of the Comptroller and Auditor General. (It is of interest that the need for such an officer has been urged to make more effective the work of the Select Committee on Nationalised Industries.) The Danish institution has in part been modelled on that of Sweden which Professor Lawson noted last summer in this quarterly. Such an officer has the tremendous advantage of having true investigatory functions, the power of report to Parliament with its attendant publicity, and a prestige which would command respect and attention. Complaints can be made simply and with virtually no expense to the complainant. Such an officer will not think himself answered if he receives from the public authority a letter which does less than answer specific complaints specifically. In Denmark, this Parliamentary Commissioner seems to have already avoided the impression among the general public of being part of established authority.

This device is one which all who are concerned with maladministration and the inevitable limitations of individual Members of Parliament should consider. Its institution would not detract from the status or function of Members. Indeed, it would give them further opportunities. Political parties might well find its propagation a useful electoral flag to fly. We hope to return to a consideration of its feasibility in this country at a later date.

THE FRANKS REPORT IN SCOTLAND

The speed which marked the Government's reaction to the Report of the Franks Committee is still evident. Circulars, similar in purpose and effect to that issued by the Ministry of Housing and Local Government (Circular 9/58), have now been issued by St. Andrew's House. The time-lag is due not to any reluctance on the part of the Scottish Departments but is in consequence of the administrative arrangements in Scotland. The fact that one Department there covers the field of several Ministries in England clearly slows up the production of such circulars. The circulars are, however, emphatic in their acceptance of the major principles of the Report. Particular provisions are backed by general injunctions emphasising the importance of openness and fairness, and also urging that everything should be done to avoid delay in taking decisions.

The circulars issued are those of the Home Department (No. 9231), which covers the majority of inquiries, of the Department of Health for Scotland (D.H.S. Circular 50/1958), which is mainly concerned with planning, and a general circular governing procedure at inquiries. They are partly intended to be stop-gap measures until the Council on Administrative Tribunals has formulated rules, and as such may produce valuable experience upon which those rules may be based; but to a large extent the circulars set out formally what is already often done. The most noticeable points in the Departmental Circulars are the preference for inquiries over hearings, and that all should normally be public, and the insistence on full explanations. Thus, in planning matters, the Secretary of State emphasises that the reasons given for a refusal should not consist of safe general formulas but should be specific—showing what amenity would be injured, etc. The same point is made in several contexts—the local authorities statement in a planning appeal should be full, the Secretary of State will himself give full reasons for "calling in" an application for planning permission. Indeed the circulars emphasise that "The Secretary of State believes that much dissatisfaction can be avoided, and time ultimately saved, by readiness to afford full explanation." If the Franks Report does achieve substantial opening up of the administrative process, as indicated by such circulars as these, it may be that this will be its main claim to fame. The cumulation of procedural safeguards which it suggested is less likely to be beneficial in the long run, and may indeed work slightly against this openness. Explanations tend to be the more guarded the more they are likely to form part of the record of a legal dispute, and although many authorities are already helpful, in some cases continued pressure from the central authorities may be necessary to maintain desirable standards. The emphasis on explanation is apparent, too, in the local deposit of the Secretary of State's reasons for decision in planning matters so that knowledge is not merely individual but also public, so that a pattern can be deduced.

The general circular on the procedure in connection with statutory inquiries carries out the views expressed by the Government in the debates on the Report. The procedures outlined in it will cover virtually all inquiries, though disciplinary ones are to be excepted. Here, at the preliminary stage the Secretary of State assumes the task of ensuring that the views of each side are clearly formulated, and thus the effectiveness of the inquiry could be increased since the points at issue will have been defined. In particular, in cases of compulsory purchase, there is an insistence on a necessary degree of specification in regard to alternative sites. At the inquiry many procedural matters are left to the discretion of the commissioner. Evidence will be given by representatives of Government Departments (who will be open to cross-examination) where either a Department is the initiating party or where the positive views of a Department have been referred to in the preliminary statement of the initiating party. In one matter the discretion of the Commissioner is limited—he is to offer to parties an opportunity of inspecting factual parts of the report and of submitting written comments within fourteen days. There will, however, remain a discretion as to the form of report. It may, and this is expected to be normal, contain recommendations, but if the Commissioner does not feel certain of Ministerial policy he may phrase his recommendations in the alternative. There again the working of this machinery may provide useful information. It is possible, though not probable, that these proposals might cause Departments to be even less ready to express definite views on proposals. On the other hand, experience of cases where Government Departments give evidence may well show that the present rules are too narrowly drawn and could well be broadened. It will, too, be interesting to see how many Commissioners are ready to make firm recommendations and experience here should be of considerable importance on the other side of the Border when the system of inspection is reviewed.

Indeed these circulars convey the impression that they are the beginning and not the end of reform; the insistence on the spirit of openness rather than on the literal importance of the circulars is a mark of this. While much that is contained in them is already standard practice, there is also much that is new, and much that receives greater emphasis—even such matters as insistence on readily recognisable references to Ministerial statements could be important. If some things which were considered impossible before the Report are now considered to be both possible and desirable there is reason to hope that the process of reform may well continue. It may continue because the circulars give an opportunity of laying two lots of bogeys. In the preliminary stages private bogeys about the machinations of a remote and obscure administration may well be killed by the insistence on explanation. At the inquiry stage administrative bogeys about the dangers of public reports and independent commissioners may equally well be removed. If in these circumstances all parties can concentrate not upon these particular bogeys but upon the realities of inquiries, then part of the administrative process could benefit greatly and the issue of judicial review assume proper proportion and not be over-emphasised.

J. D. B. M.

INDUSTRIAL ARBITRATION AND JUDICIAL POWER

In the *Boilermakers' Case* [1957] A.C. 288, the Privy Council, affirming a High Court majority, turned the judicial power of the Commonwealth into even more of a constitutional strait-jacket than it had previously been. The Australian courts have since been engaged in adjusting the working of government, and in particular the working of industrial arbitration, to this constricting garment. Three illustrations of the process are *R.* v. *Spicer, ex p. Australian Builders' Labourers' Federation* [1958] A.L.R. 1, *R.* v. *Spicer, ex p. Waterside*

Workers' Federation [1958] A.L.R. 121, and *R.* v. *Spicer, ex p. Foster* [1958] A.L.R. 385.

The *Builders' Labourers'* case concerned the power conferred on the newly created Commonwealth Industrial Court to disallow the rules of industrial organisations; the High Court held 4–2 that this power was non-judicial, and accordingly could not be conferred upon the Industrial Court (but consequentially would have to be conferred upon the newly created administrative or quasi-legislative instrument of the system, the Commonwealth Conciliation and Arbitration Commission). The *Waterside Workers'* case concerned the power, also now conferred on the Industrial Court, to consider appeals from suspension of waterside workers by the Australian Stevedoring Industry Authority. Here the High Court unanimously held that the power to cancel or suspend registration of waterside workers (on which their liberty—privilege?—of employment depends) was non-judicial in character, and accordingly an appeal by way of complete rehearing on the same grounds was likewise non-judicial and could not be vested in the Industrial Court. In *Foster's* case, on the other hand, the High Court held unanimously that a power to direct officers of an industrial organisation to carry out the rules of the organisation (in this case, in relation to the holding of a union election) was judicial and accordingly was validly vested in the Industrial Court.

In all three cases, the characterisation of the particular power was to some extent determined by previous decisions in which for other reasons (such as the destination of appeals) the High Court had had occasion to characterise the power in question. In the splitting up of powers between the new Industrial Court and the new Commission necessitated by the decision in the *Boilermakers'* case, the legislature had not completely redrafted the previous Conciliation and Arbitration Acts (though by this time their form was very disorderly and their substance in many respects unsatisfactory), but merely allocated powers as set out in the previous Act to the new tribunals. Hence the High Court was well justified in characterising the powers so re-allocated as retaining the same quality they had been held to possess in earlier decisions, even though those decisions had been arrived at *alio intuitu*. The chief argument against this depended in substance on the presumption of validity; since the whole purpose of the operation was to overcome the disastrous consequences of the *Boilermakers'* case, one might assume that, when allocating a particular power to the court, Parliament intended that power, if possible, to be treated as judicial rather than non-judicial, and it was partly for this reason that Williams and Webb JJ. dissented in the *Builders' Labourers'* case. But the presumption of validity today appears to have little force in either the High Court or the Privy Council. But these decisions also rested on a substantive inquiry into the nature of the relevant power; the aspect of judicial power emphasised is thus indicated by Dixon C.J. in the *Waterside Workers'* case (at p. 125): " The true intent of the legislation is that the exercise of the power . . . should be governed by what might broadly be called administrative and industrial considerations and should not be restricted to purely legal criteria." One notes here the naive assumption that " legal criteria " require some sort of rule-structure excluding the exercise of a wide discretion, though dicta in all the cases indicate an appreciation of the compatibility of *some degree* of discretion with judicial power. Actually such distinctions can only be questions of degree, and it would be monstrous if by a negative inference the power of the non-judicial administrative tribunal were to be regarded as having an ambit of discretion beyond judicial control. But if an administrative discretion can be and must be subject to judicial control as to the criteria which the administrator is free to adopt, then the case for regarding such discretions as not subject to " purely legal criteria " is greatly weakened. The word " purely " is seen as a meaningless adjective, or at the best only an emotive one.

In functional terms, the first two of these decisions satisfy common sense; indeed, Dixon C.J. himself in the *Waterside Workers' Federation* case says that that decision embodies " what may be described as a realistic approach." It is desirable that the general supervision of industrial organisations should be undertaken by the tribunal which is officially encouraged to pay regard to policy, rather than by the tribunal which has to seek " purely legal criteria " in a field of law where such criteria have little social value. One may doubt whether the third decision was as satisfactory, since even in directing union officials to observe their rules, an industrial tribunal is dealing with " rules " and situations requiring for their understanding and useful enforcement a kind of discretion and tact which is not required, say, when interpreting a will.

G. S.

STATUS OF FEDERAL TERRITORIES

In *Lamshed* v. *Lake* [1958] A.L.R. 388, the High Court had to consider the operation of a federal law with respect to Federal Territories (made under section 122 of the Constitution) in the State of South Australia. The law in question, following the words of section 92 of the Constitution (which made trade " free " only *between states*), provided that trade between the Northern Territory and the states should likewise be " absolutely free." Under the recent interpretation of section 92 adopted by the High Court and the Privy Council, a South Australian road transport Act was invalid in its application to interstate road hauliers. Was it also invalid in its application to a road haulier operating from South Australia into the Northern Territory, so far as the part of his journey *within South Australia* was concerned? The court held 4–2 that it was. Dixon C.J., with whom Webb, Kitto and Taylor JJ. concurred, gave a comprehensive analysis of the nature of the federal power with respect to Territories which will provide much-needed guidance on many of the problems arising in relation to Territory government. He carried a stage further the process of discrediting earlier decisions under which the " Territory " power had been treated as in some ways standing outside the general body of the Constitution; this implied that the Commonwealth Parliament occupied as to the Territories the position of an unrestricted sovereign power — but one which so regarded was bound by territorial limitations of the strictest kind. Dixon C.J. has always resisted this kind of interpretation. Where in other contexts (such as that dealt within the note above) he has tended towards a constitutional law of rigid concepts and pseudo-logical reasoning, in this area he has constantly insisted: " We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications."

This decision will enable the Commonwealth to regulate the relations of its Territories with the whole of Australia, and in doing so to override, to whatever extent necessary, state laws which may stand in the way. But the decision also makes the Commonwealth subject to constitutional prohibitions where they are in terms capable of application to the Territory power. An interesting example which Dixon C.J. specifically mentions is the provision about religion in section 116. There was a mild stir in the Australian Capital Territory three years ago when the Menzies-Fadden Government introduced a policy of giving some financial assistance to schools owned or controlled by religious denominations. The matter was not judicially tested. One of the peculiar features of provisions like section 116 (and the similar U.S. First Amendment) is the difficulty of finding a plaintiff with *locus standi* to challenge; probably this was the main reason why no action was taken. However, the Government also relied on an inference from earlier cases that section 116 had no application in Federal Territories; this view cannot survive the instant case. That, however, by no means solves the substantive problem of the " church school aid " issue, since it would still be necessary to establish whether such aid amounts to a " law for establishing any religion "; there is weak American authority suggesting an affirmative answer, but it is possible that this authority would not be followed by an Australian court.

G. S.

JUDICIAL REVIEW IN SWITZERLAND

July 10, 1958

The University,
Leicester

To the Editor of Public Law,

Dear Sir,

I am cited in your Summer Number, p. 119, as saying in my commentary *The Federal Constitution of Switzerland* (1954) that Switzerland has "lodged the power of judicial review of both cantonal and federal legislation in its Federal Court." I do in fact say, on the page quoted, "Federal Laws and Arrêtés de portée générale, and treaties, may *not* be attacked before that [the Federal] Tribunal." It is difficult to see how I could have been more explicit.

On the next page, however, I discuss briefly the vexed question of whether the constitutionality of the decrees of the Executive (the Federal *Council*) can be disputed before the Tribunal. I can only assume that your learned correspondent has either overlooked the word "not," or, more probably, has confused the name of the Executive with that of the Legislature (the Federal *Assembly*). As your correspondent draws far-reaching conclusions from the Swiss example, and as it is embarrassing to be cited as authority for a proposition which is obviously false, I shall be grateful if I may make this small correction.

I am, etc.,
C. J. HUGHES.

THE HOUSE OF LORDS CONTROVERSY

LORD CHORLEY

INTRODUCTION

CONSIDERING how much the English pride themselves upon their political instinct, which they like to think amounts to genius, they have displayed a singular inability to solve the problem of their parliamentary Second Chamber. Or perhaps their reluctant readiness to do as much as, and no more than, the situation has required in the way of modifying the constitution and powers of the House of Lords shows that their political instinct has been at work after all—for the Parliament Act, 1911, at the time regarded simply as a temporary measure to fill the gap while a satisfactory measure of reform was worked out, is now regarded as Asquith's chief claim to statesmanship. Who knows whether in another generation's time the Life Peerages Act, 1958, pushed forward with almost apologetic lukewarmness by a Conservative Government, derided by the Labour Opposition, and received with supreme indifference by the general public, may not receive similar approval from the constitutional historian. I shall return to this point at a later stage in this article.

Although only a few people take more than a cursory interest in its activities at the present time, the House of Lords is one of the world's most fascinating political institutions; not less so than the House of Commons.[1] A cursory survey of the parliamentary institutions in the world today also makes clear that among Second Chambers there are none which do their job more effectively than does the House of Lords. Why then is it defended half-heartedly by the Conservative Party, derided by the Labour Party and for the most part ignored, as a political institution, by the general public?

There are, of course, a number of reasons, but there can be no doubt that far and away the most important is its hereditary composition, which is, of course, only another way of saying its lack of responsibility to the electorate. That political power should be in the hands of an hereditary aristocracy is not politics in the modern world: it cannot be squared with democracy, which is the basic principle of our modern constitution.[1a] Even among the empirical

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[1] Evidence of this may be derived from the fact that in recent years several studies have been made of its work: *e.g.*, P. A. Bromhead: *The House of Lords and Contemporary Politics*; the Hansard Society: *Future of the House of Lords*; and the Fabian Society: *Reform of the House of Lords.*

[1a] See Wade in 2 Mod.L.R. 177: "The Law of Public Meetings."

English the fact that the House of Lords works fairly well in practice does not provide an answer to the illogicality of its constitution. Nor does the fact that the working House of today is for the most part composed of peers of first creation—most of them recruited from the House of Commons—weigh down the balance against all those seven hundred backwoodsmen who are not only in law the House of Lords, but also in fact to the ordinary man in the street. Our Upper Chamber is the only survivor in Europe of the medieval chambers of hereditary notables, and nothing can gloss over that stark and unpalatable truth. It is this which in my view bedevils the whole situation and has made it impossible to discover any acceptable solution.

Conservatives are for the most part thoroughly ashamed of the House of Lords as it exists today, with its stage army of backwoodsmen, and are torn between this distaste and their lively realisation of its political power which is still useful to them. If they could preserve this power they would be glad to see the Second Chamber reconstituted upon some, indeed any, more defensible basis. And it is not at all surprising that all recent attempts at reform have been initiated by the Conservatives.

To the Labour Party the hereditary house is altogether too easy a target for there to be any enthusiasm for reform from that quarter. The heat can always be turned on effectively so as to secure a further whittling away of the House's already limited power of delay, or to secure the rejection of sensible House of Lords amendments to Labour measures, as was witnessed on several occasions during the 1945–50 Parliament. This Labour enthusiasm for an unreformed House of Lords reached its climax during the debates on the Life Peerages Bill when the Party actually went into the division lobby to vote against the quite unexceptionable reforms contained in that measure—many of those who recorded these adverse votes no doubt hoping in due course to take up the life peerages against which they knew quite well they were entering an ineffectual protest. This does not, of course, mean that there was not substance in much of the argument put up against the Bill, but it was an argument not so much against what the Bill contained, as against what it did not contain.

With regard to the general public, if they ever had any interest in the House of Lords as a political institution—except, of course, when it was engaged in thwarting the Commons—that has long since vanished. The Englishman " dearly loves a Lord," but as a social not as a political animal, and the average citizen takes little interest in the work of the Lords especially when they are occupied with their legislative functions.

In this article I propose rather to offer comments upon the above points than to attempt a balanced review of the powers, composition and reform of the House of Lords. Ever since the Parliament Act of 1911 the problem has been on and off the stage—rather more off than on—and the reason why it is very much on the stage at the present time would appear to be chiefly due to the pertinacity of Lord Salisbury.

Even the enemies of the House of Lords agree that little fault can be found with its activities between 1945–51,[2] while its more objective critics consider that much of its work during this period was constructive in character. Much if not most of the credit for this has been attributed to the wise leadership of the Opposition by Lord Salisbury.[3]

The Salisburys have during the present century been the principal protagonists within the ranks of the peerage of House of Lords reform—the father of the present Marquis was, of course, well known for his pertinacious if unsuccessful efforts to get something done. Lord Salisbury's experiences during 1945–50, especially perhaps in connection with steel nationalisation, when the efforts of the Conservative peers to defend private enterprise in that industry did not evoke a great degree of enthusiasm among the general public, seem to have convinced him that if the Lords are really to play an effective part in holding up and perhaps preventing legislation which he considers wrongheaded it must command greater confidence among the electorate.

Lord Salisbury played an important part, possibly the outstanding one, in the all-party discussions in 1948 on House of Lords Reform which were so nearly successful, and since that time he has been unremitting in his efforts to persuade his own party to underwrite his own proposals. With the advent of a Conservative Government to power in 1951 and his own accession to the leadership of the House he was naturally in a strong position to get something done. Nevertheless it was several years before he succeeded in persuading his colleagues to put House of Lords reform into the Queen's speech. This is a little puzzling. It may be that Lord Salisbury's known insistence on retaining a strong hereditary element in the reformed Lords did not commend itself to his colleagues, some of whom are known not to be enamoured of that principle, and some evidence in support of this view can be found in Lord Hailsham's acid retort to Lord Salisbury's speech on the second reading of the Life Peerages Bill in which he pointed out that his own efforts to secure legislation had been a failure, possibly because " he was fishing with the wrong fly." It certainly seems significant that in the very first session of Parliament after Lord Salisbury ceased to be leader in the Lords a statute should have been passed which on the face of it sidesteps the hereditary basis for the future selection of peers.

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[2] The exceptions which could be pleaded to this statement are, I think, only two in number: *viz.*, the defeat of the Commons proposal for the suspension of capital punishment in 1948, and the rejection of the Steel Nationalisation Bill in 1949.

[3] This view with which I personally am in agreement has been endorsed by no less an opponent of the noble Marquis than Mr. Herbert Morrison in his book *Government and Parliament.*

The Life Peerages Act, 1958, does nevertheless preserve the hereditary House in large measure: indeed, that has been the principal line of attack upon it taken by its critics. It is hardly necessary to say that there is no necessary connection between an hereditary House of Lords and a Second Chamber in Parliament. Nevertheless, the emotional disturbance which the hereditary House, its past misdeeds and present snob composition arouses in many political breasts prevents many left wing members of Parliament from discussing the question of a Second Chamber objectively. This matter will, therefore, be the first which I shall consider in this essay.

THE NEED FOR A SECOND CHAMBER

The arguments in favour of a Second Chamber were well stated by the Bryce Committee in 1918,[4] and have in general appealed to constitution makers throughout the world; for almost all Parliaments are in fact bicameral.

Since the House of Lords question began to become burning during the nineteenth century there have, however, in the United Kingdom been radical politicians who rejected these arguments and contended that a unicameral legislature is to be preferred. They were, perhaps, more influenced by emotion than by reason in coming to their conclusions in this matter, though an arguable case can certainly be made out in their support. This view is still held by a section of the Labour Party including some members of the House of Commons. It is not easy to judge the strength of those who hold this opinion. They are probably a minority, but include influential members on the left, and in the debate on the second reading of the Life Peerages Bill they did not want for influential spokesmen.[5]

This obviously lies at the very heart of the matter which we are discussing and it seems to me a great pity that the case for a unicameral legislature has not been put more effectively and authoritatively. It is obviously not possible to go into that case in detail in this article. Certainly some of the Bryce points seem less cogent now than they did forty years ago. Thus delay is

[4] They may be summarised shortly as (i) the examination and revision of Bills, (ii) the initiation of the less controversial type of legislation, (iii) the discussion and delaying of controversial proposals so that public opinion might have time to form and make itself felt, (iv) the debating of important matters of policy.

[5] These included Messrs. Bowles, Aneurin Bevan, Mulley (perhaps) and Miss Jenny Lee.

regarded as of less importance than formerly, and general debating is clearly not essential. The vital work of the House of Lords at the present time is revision and initiation of legislation and these elements have obviously become underlined by the growth of parliamentary activity since 1918. Indeed, it should be quite clear to any sensible person with experience of the work of legislation at Westminster that this would on its present scale become practically impossible without the sort of contribution which is at present being made by the House of Lords. Nevertheless, in the recent debate on the Life Peerages Bill speakers were not wanting in the Commons to maintain that all this work could be so competently done there that a Second Chamber is quite unnecessary.

And it would no doubt be possible to work out a scheme of procedure in connection with the legislative process which would obviate the need for a Second Chamber; indeed, tentative suggestions have been made from time to time that it could be done by the strengthening of the committee work in the Commons, which I shall comment on later. In spite of the speeches just mentioned it is not unfair to say that little real thought has been put into this problem by the protagonists of the single-Chamber legislature. There are some aspects of the present system which support their case. Thus it is very wasteful of time with its repetitive full dress debates on second reading and involves some overlapping at the Committee stage of Bills. If a really good unicameral system which effectively looked after revision and provided time for adequate debating at the introductory stage for all Bills were proposed, serious consideration would obviously have to be given to its adoption.

It would perhaps be unfair to leave this topic without referring in greater detail to the speeches made in the Life Peerages Bill debates which I have already mentioned. The most important of these was that made by Mr. Bowles, who suggested that a new legislative stage should be introduced between Report stage and Third Reading devoted entirely to technical polishing up. Mr. Bowles seems to be under the impression that the revising work of the Lords is almost entirely drafting in character and could be just as well done in the Commons. This is true of a sizable majority of such amendments, and naturally so. But as will appear hereafter important amendments of principle are often made in the Lords which the Government of the day is glad to accept.

Moreover, the need for technical amendments to Bills at a late stage[6] does not as is commonly supposed result from the alterations to the draftsman's work which are made in Committee, but from inherent defects in the drafting which result from the intrinsic difficulty of the work and from the pressure under which it is carried out. A delay of the sort of duration which occurs between Commons and Lords is probably essential if these mistakes are to be spotted. It would be very difficult if not impossible to persuade the Commons to agree to a delay of the requisite length before the New Stage suggested by Mr. Bowles.

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[6] An excellent illustration of this was given by the late Lord Jowitt in connection with the Redistribution of Seats Bill, 1946. See Official Reports H. of L., January 21, 1947.

Mr. Aneurin Bevan who supported Mr. Bowles also took the view that Lords amendments are merely textual and are inserted without any serious discussion; which only shows how very little even the most eminent members of the House of Commons know about the work of the Lords. Mr. Bevan was very much opposed to the sort of delay which is involved in Bills having to go to the Lords at all, even if they are handled sensibly there. He said that " long before it (the Bill) sees the light of day all sorts of interests will have been consulted about it." The idea that, after all this, sensible suggestions for amendment could be made in the Lords he considered to be " poppycock."

These proposals for a unicameral legislature postulate substantial reform in House of Commons procedure.[7] That House, however, is an intensely conservative institution and the Parliamentary Labour Party whose members usually have less experience than the Conservatives of the revolutionary changes now going on in some branches of modern business does not give the impression of being ready for substantial reforms in its procedure. Moreover, the conditions of government in the United Kingdom with its party political warfare are the reverse of conducive to adequate revision of legislation in the House of Commons. It is largely because of this that the role of the House of Lords as a revising Chamber has of recent years become so essential; and never more so, ironically enough, than in the time of the great Labour Government of 1945–50.

It is my impression that apart from some of the highest Ministers such as Lord Attlee the members of the Parliamentary Labour Party had little appreciation of the contribution which was being made to the success of their legislative programme by the House of Lords in 1945–50. And this is perhaps particularly so with the members of the " let the House of Lords wither away " school. It is here that the emotional undercurrent against the Lords, generated by their past misdeeds but still flowing strongly, has unfortunate effects.

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[7] We have, of course, recently had proposals for reformation of procedure, *e.g.*, over divisions which could result in a substantial saving of time. The difficulties which arise in connection with the all-important Committee stage of Bills are not, however, susceptible of solution by procedural methods: they are essentially political.

Having played a small part in these affairs, and played it in the Lords, I am possibly over-impressed by the work which was done there between 1945–50—and since for that matter. As, however, I have become convinced that in the conditions of modern British politics much useful legislation would be lost and the quality of that which is effected would deteriorate appreciably without a Second Chamber, I would like to set out shortly some of the reasons which have led me to this view.[8]

REVISION WORK OF THE LORDS

It will have become clear from what I have already said that I regard the revisory work of the House of Lords as its most valuable function. This is, of course, done on the Committee stage of Bills, a process of much greater importance than is commonly realised. Almost all important Bills now emanate from one or other of the great Departments of State, where they have usually been subjected to a fairly careful preparatory process in which the proposals have often been submitted to interested persons and organisations.

In spite of this they are almost always defective and often seriously so in many ways. One would expect this to be so in the case of far-reaching political measures such as most of the nationalisation and much of the welfare legislation of 1945–50. Many of the detailed proposals contained in these enactments had not been worked out in any sort of detail until a few months before the Bills were introduced. As soon as they were subjected to careful scrutiny defects began to be observed both of substance and of phrasing. There is nothing like prolonged public discussion, during which the voices of those who are going to be most closely affected by the legislation in question can become audible, for bringing out the weaknesses in legislative proposals which at first sight may look entirely satisfactory. It is at the Committee stage that these matters can be put right, and that is, of course, the main reason why this stage is of such immense practical importance.

The period between introduction and Committee stage in the House of Commons is never long enough for all the desirable criticism to be mobilised and brought to bear. The fact that at a substantially later stage there will be a further opportunity for detailed analysis and amendment in the Lords obviates this difficulty to a considerable extent.

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[8] My case is I think made conclusively by Mr. P. G. Bromhead in his recent excellent book *The House of Lords and Contemporary Politics*, to which I must refer the reader for fuller discussion. Thus he quotes tributes by Mr. Attlee, as he then was, and other Labour Ministers to the value of the work done in the House of Lords to the Labour Party's legislative programme of 1945–50.

But there is another serious defect in the position at Committee stage in the Commons. The criticisms and proposals for improvement have in the nature of things to be put forward through the Opposition and this tends to make the Government regard them with hostility, for it is not always easy to be sure that some lurking political motive does not underlie a seemingly innocent amendment; and in any case the Opposition will undoubtedly take political credit for any alterations they succeed in bringing about, however non-political their source of inspiration may have been. Moreover, officials who have spent months in the preparation of Bills tend to react unfavourably to suggestions that they have made mistakes—that is human nature. In these ways many useful amendments are lost in the Commons the essential value of which may have been realised by the time they are debated in the Lords. Again, on big political Bills the political fight is waged as hard or harder in Committee than when the Bill is debated on the floor of the House on second reading. Thus the guillotine has to be applied from time to time, so that many clauses in such Bills never receive detailed discussion in the Commons and many valuable amendments are never reached. In the Lords the atmosphere is never so tense; no difficulty is found about detailed discussion of clauses; and amendments not reached in the Commons are again put down, debated and sometimes accepted by the Government of the day. Mr. Herbert Morrison, who has often attacked the House of Lords as a political institution in forthright terms, has compared its Committee work with that of the Commons most favourably to the Lords, commenting particularly both on its quality and speed. *

The above argument can be strongly supported by detailed reference to what happened in 1945–50. In a pamphlet published by the Fabian Society in 1954 [9] an analysis of the work of the House of Lords during the Session 1948–49 was made. During this period when the Labour Government may not unfairly be said to have lost some of its earlier vigour, 916 amendments to 41 public Bills were moved in that House. While, to take one example of the way an important public measure was dealt with, I will cite that of the Transport Bill of 1946–47 which came to the Lords from the Commons with many of its clauses quite undiscussed. It was subjected to prolonged scrutiny in the Lords—nine days in Committee and two days on Report. During this period no fewer than 240 amendments were made. While some 40 of these were regarded by the Government as political and rejected in the Commons all the others were allowed to stand. Many of these were only concerned with drafting but even so they had not been spotted in the Commons or, if they had, there had been no time to get them put in. But quite a number were amendments of substance which gave effect to constructive suggestions put forward by interested organisations outside Parliament. Indeed, it would seem that some of the Lords amendments rejected by the Commons fell into this class. In any event it is clear enough that without a revising Chamber the Transport Act would have been defective in many ways. *The Times* might well say, as it did of this Bill, that " if a revising Chamber did not exist it would have to be invented."

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[9] *Reform of the House of Lords* by Chorley, Crick & Chapman.

But it is not only the big political Bills which require revision and not only the Bills which are pushed through with speed. Technical Bills are perhaps most vulnerable of all to criticism. A very legal Bill such as the Companies Bill, 1947, must be a nightmare for the draftsman who has it assigned to him. It is most unlikely that he will have been trained as a company lawyer, and I find it impossible to accept the conventional view that a good draftsman can turn his hand to any sort of measure with equal competence. The Bill which was introduced in the Lords required to be amended over 350 times before it went down to the Commons, and although many of these amendments were merely " consequential " on earlier drafting amendments the amount of revision that was required is obvious. All this was carried through in the Lords expeditiously with the assistance of legal members who were experts in the subject. It is difficult to calculate the time saved to the Commons, but it was clearly substantial in amount.[10]

This Companies Bill also illustrates the application of a technique which has been used several times in the Lords [11] but which it would not be easy to make use of in the Commons, that is an informal pre-Committee stage attended by peers representing the parties and experts in the subject-matter of the Bill. The Cohen Committee on the Amendment of Company Law had devoted much of their attention to the problem of accounting, the provisions as to which in the Companies Act, 1929, were generally agreed to be inadequate. They had propounded a solution which though accepted by the Board of Trade was generally regarded in the accountancy profession as unsatisfactory. Strong representations were made to Opposition leaders in the Lords who were briefed so competently that they were able to open a damaging attack on the relevant clauses and schedule in the Bill. The Lord Chancellor (Viscount Jowitt) appreciated the force of this, and with a suppleness and good humour which were characteristic suggested that representatives of both Conservative and Liberal Opposition should meet him informally with their technical advisers.

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[10] Nevertheless it was suggested in the Commons by Mr. William Ross, M.P., during the debate on the Life Peerages Bill (see Official Reports (H. of C.), Vol. 582, col. 641), that the Committee stage of this Bill in the Lords was a perfunctory affair as " a lot of the things that are discussed here " (*i.e.*, in the Commons) " go through on the nod " there. Actually, quite apart from the informal discussions referred to below which required several meetings, this Committee stage required some twenty hours of parliamentary time, and the number of occasions on which the Bill was before the Lords extended into double figures from first to last.

[11] Other examples are the National Parks Act, 1948, and the Copyright Act, 1956.

Several of these meetings took place and were attended by the draftsman, Board of Trade officials and others. In them a completely new scheme was hammered out which duly took its place in the Companies Act, 1947, and is that which now governs the drawing up and presentation of company accounts.

Even Bills which have been in preparation in the Departments for years will require modification and revision. The Criminal Justice Bill of 1948 dated from the more leisurely period of the 1930s, when the outbreak of the war in 1939 had forced its withdrawal. The proposal to amend it by inserting a suspension of the death penalty gave rise to much controversy and provided the opportunity for the Lords to kill a proposal which had the backing of a small but convinced majority in the Commons. This somewhat obscured the major proposals of policy contained in the Bill which were of the first importance. Notwithstanding the long and careful preparation which had been given to the Bill in the Home Office it needed a good deal of revision, and was amended in a number of important respects both in the Commons and in the Lords.

The fact that the revision of legislation by a Second Chamber seems to be a highly desirable, if not an essential, part of the legislative process, does not, of course, mean that we have yet discovered how to do it perfectly, or even as well as it could be done in the conditions of practical politics. There is certainly room for a good deal of improvement in the work of the House of Lords in this respect. Pertinent criticism was directed at it by unicameralists in the debate in the Commons on the Life Peerages Bill. Thus Mr. Bowles supported his argument that an independent revising Chamber is unnecessary by giving instances of what he alleged was the scamping of its work by the Lords. He instanced the Rent Act on which the Commons had spent eighty-eight hours in Committee and Report stages as compared with the eleven hours by the Lords: " there was no proper revision," and he considered the Lords' use of their revising powers " derisory." [12] It might perhaps be cruelly replied that eleven hours in Committee with the Lords produces more useful work than eighty-eight in the Commons! There are cases, however, where the work is done in a somewhat perfunctory fashion. Thus Mr. Malcolm MacPherson, who nevertheless felt the need for a revisory Chamber and considered this " the essential question in connection with the future of the House of Lords " pointed out that a Bill as important as the British Nationality Bill could go through all its stages in the Lords without occupying so much as sixty minutes of time; the Committee stage producing no discussion at all.[13] And other examples would not be difficult to find.

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[12] See *ibid.*, col. 469.

The reason for this sort of thing is not far to seek. It lies in the difficulty of ensuring that a sufficient number of peers suitably qualified to take part in such work are always available for attendance. Unlike members of the House of Commons peers are not remunerated for their work, and there are few, especially among those in the Labour Opposition, who can afford to give more than a fraction of their time to the work of the House. The main criticism of Government Bills naturally comes from the Opposition, so that up to a point the revisory work of the House depends on the accident of whether a sufficient number of Opposition peers are able to attend at a particular time on a particular day. With the big political Bills there will naturally be a special effort, stimulated by a Whip; but with smaller, though perhaps quite important, Bills this will not be so. Again the effectiveness of work in Committee may depend on the accident of whether there are outside organisations or groups of people sufficiently affected to send in criticisms and proposals for amendment to individual peers known to have an interest in such matters.

A quarter from which a good deal of help could be forthcoming, and which could be particularly effective because of their expert knowledge, is the Law Lords. Possibly because they may eventually have to decide upon the meaning of statutes in their judicial capacity the Law Lords seem to fight shy of the Committee stage in Bills. There is certainly no rule about this, however, for Lord Maugham, an ex-Lord Chancellor and Lord Simonds, a Lord Chancellor to be, both took an active and valuable part in the Committee stage of the Companies Bill, 1947 (and this is certainly not an isolated example). The advantages to be derived from the assistance of the Law Lords in this matter so patently outweigh the possible drawbacks that in any reform of the procedure for revisory work in the Lords it would be useful to make it definitely part of the duties of the Law Lords to take part in it.[14]

INITIATION OF LEGISLATION

It is not generally realised how much time is saved to the Commons by the practice of initiating legislation in the Lords. Thus probably more than half the routine measures which are largely concerned with such matters as consolidation, or local matters (" private " Bills) originate there. In addition it is usual to introduce technical measures there, especially those concerned with the law and its administration. These are often very heavy from a legislative point of view, taking up a great deal of parliamentary time. The Companies Act, 1947, with 462 sections and 18 Schedules, is a good example of such a measure: its Committee stage has already been referred to. The Copyright Bill, 1956, provides another good example of this kind of work. This time a Conservative Government held informal discussions with interested peers and in Committee accepted a number of amendments moved from the Labour Opposition benches.[15]

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[13] See *ibid.*, col. 474.

[14] In a speech on prisons and punishment in the Lords Viscount Astor recently criticised the failure of the Law Lords to assist the House in its discussions on matters of which they have expert knowledge, but in the absence of any convention as to their general position in the work of the Lords it is a little difficult to see where their duty lies.

And quite a number of non-technical Bills of substantial importance, some of them even not without political flavour, have been initiated in the Lords. Thus the Labour Government started the Justices of the Peace Bill, 1948, there, and its Committee stage required four sittings, time for which certainly could not have been found in the Commons at that stage.[16] Again the Conservative Government introduced its Road Traffic Bill, 1955, in the Lords. Bills of this kind do in fact tend to occupy as much or more time in the Commons when they get there than was given to them in the Lords; but this does not necessarily mean that the Committee work of the Lords was inadequate on such occasions.[17]

GENERAL DEBATES

The procedure of the Lords provides ample opportunity for general discussions of matters of public interest and importance, while the atmosphere of the place and the personnel available to take part in them ensures that these will reach a good level of competence and will sometimes be of a very high standard indeed. However, in modern times, Parliament has become an institution essentially concerned to keep the work of the Government under constant review and, if necessary, criticism, and to give the imprimatur of the community to the legislative proposals of that Government. General debating is no longer in the centre of the picture and it is significant that it has so largely disappeared from the work of the dominant Chamber.

In these circumstances it seems questionable whether this aspect of the work of a Second Chamber can still be regarded as so essential as it was by the Bryce Committee who, even so, put it at the bottom of their list. This view of the matter was reflected in some of the speeches made in the Commons on the debate on the Life Peerages Bill. But quite a number of speakers considered this function of the Lords still valuable.[18]

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[15] Mr. Bromhead remarks of these two measures " the Lords made . . . immense improvements. Governments have derived inestimable advantages from being able to present such Bills to the Commons in a form so greatly improved by the contributions of the Lords."

[16] See Fabian pamphlet, *loc. cit.*, p. 41.

[17] See Bromhead, *loc. cit.*

It is the educative value of these debates which has been mostly stressed. Yet it may be doubted whether this is very high so far as the general public is concerned, for the debates are not really reported in the national press, except occasionally when the subject has some dramatic appeal, such as infiltration by security officers into the universities, or makes some other sort of unconventional appeal, as artificial insemination by a donor. Only two or three national newspapers which cater for " the top people " or for highbrows contain regular reports of House of Lords debates; and even those on subjects on which a number of peers speak with much greater authority than any except a handful of ministerial rank in the Commons, such as foreign affairs or defence, are as often as not ignored by the popular press.[19]

The fact that a speech is made by a peer is nowadays if anything a disadvantage from the point of view of publicity. No doubt if Lord X visits a provincial town to open a bazaar his visit will attract the attention of the local newspapers, which will probably publish his photograph. But if he goes down to address a meeting he will attract an even smaller audience than a member of the " other place." The truth is that membership of the Lords no longer carries political prestige, and its more serious debates are ignored by the general public.

The debates no doubt have a value to groups and sections in the community, though this would hardly justify the retention of the House of Lords as part of the British constitutional set-up did it not serve other and more useful purposes. The real value of the privilege which every peer has to initiate a discussion in the Lords, however, lies in the fact that by this means the Government may be called upon to make a statement as to its policy upon some particular matter or to defend its actions: the adjournment debates in the Commons are far from having the same effectiveness.

THE OBJECTIVE?

In the above survey, apart from the briefest of mentions, nothing has been said about the power of the House of Lords to thwart the purpose of the Commons by holding up legislation—the legislation of a Labour Government, of course, and during the later years of a Parliament. This was the great battleground of the past and it is impossible to imagine a debate in the Commons on the subject of the Lords without that theme being fairly prominent in it. Thus it naturally provided the refrain for several of the attacks on the present Government's Life Peerages Bill, and there were even pre-echoes, so to speak, in the Lords, as when Lord Stansgate, very much an old House of Commons man, attributed the quietism of his fellow peers during the period of 1945–50 to fear following shock at the defeat of the victorious war leader, Sir Winston Churchill, at the 1945 General Election.[20]

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[18] See particularly Donald Chapman, M.P., *loc. cit.*, col. 641, who considered these discussions as " good for the country," and he referred to several important debates out of thirty-seven held during the period reviewed in the Fabian pamphlet.

[19] Thus the debate on foreign affairs of March 13, 1958, was reported only in *The Times*, the *Manchester Guardian* and the *Daily Telegraph*.

Nevertheless, I do not believe that this aspect of the House of Lords problem is a very serious one. The delaying powers of the Lords under the Parliament Act, 1949, are now so short as not to amount to much more than is required for serious revision and they could if necessary be still further reduced by a new Labour Government. But the Lords have only used such powers as they have in connection with one measure of a political character since the War, that is the Iron and Steel Bill, 1948,[21] so that even if that episode is to be regarded as symptomatic it is not a symptom of a very grave disease. I doubt, however, if such a policy would again be followed because it would automatically lead to a still further reduction in the suspensory veto of the Lords.

In the result the crude power aspect of this problem does not seem to me to be serious and on the whole this was reflected in the more thoughtful speeches from the Opposition Benches during the debate on the Life Peerages Bill. But the manoeuvrings which have been going on and of which that Bill represents one aspect do, of course, reflect an attempt on the part of the Conservative Party and particularly of the Conservative peers to enhance the prestige of the House of Lords as a political institution, and, since in politics prestige means power, to increase its power. Uneasiness about this was evident in the speeches of Opposition spokesmen in both Houses during the recent debates.[22] But the need for a particular piece of machinery in the legislative process and the jockeying for position in the using of it are two quite separate things and the apparent willingness of some Opposition speakers to abandon the machinery because of lack of confidence in their ability to counter the prestige of a renascent House of Lords is a little surprising.

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[20] See Official Reports (H. of L.), Vol. 206, col. 996.

[21] Although naturally referred to a good deal by abolitionists the two occasions on which the Lords have frustrated attempts to abolish capital punishment do not really fit into the picture of that House as a political assassin.

[22] The point was put most forcibly by Mr. Cledwyn Hughes, M.P., who described the Life Peerages Bill as "part of the struggle for power." Again Mr. Hugh Gaitskell, M.P., said that the "real argument" against the Bill was that "this change will enhance the prestige of the House of Lords, and make it less vulnerable to attack." *Loc. cit.*, cols. 509 and 419.

These manoeuvrings have certainly been interesting and are deserving of comment, even if they hardly justify the dark suspicions cast upon them in the Commons debate. The most important point here is the attempt to get rid of the backwoodsmen, that worrying thundercloud about which the Conservatives have been so self-conscious during recent years.

THE SWINTON COMMITTEE AND RECENT DEVELOPMENTS

In 1953 the late Marquis of Exeter raised the question of whether it would not be possible to exclude those peers who habitually failed to attend Parliament from the right to vote in divisions. This suggestion had a favourable reception from his fellow peers and it was even proposed that it would not be unreasonable to withdraw the writ of summons itself in such cases, an idea which had been put forward by Lord Newton as long ago as 1907. The leader of the House, Lord Salisbury, evidently had some doubts about the proposal, for it was not until 1955 that he tabled a motion for the setting-up of a Select Committee to inquire into the powers of the House in relation to the attendance of its members. But Lord Salisbury has always been torn between his faith in the hereditary principle and his political instinct, which makes him realise that heredity can no longer carry so many backwoodsmen.

This Select Committee which was presided over by Viscount Swinton and contained two of the Law Lords among its members, as well as other peers with legal qualifications, took a great deal of evidence and issued a report, which is well worth study.

The Committee were clearly of opinion that every peer is constitutionally entitled to receive his writ of summons to Parliament: backwoodsmen could not therefore be excluded by the simple expedient of not issuing writs to them, nor, the Committee considered, by various subtle variants based essentially on the same proposal. Indeed it is clear that only by statute can they be effectively eliminated. Nor did the Committee feel that the suggestions to deprive absentee peers of their votes on the rare occasions when they saw fit to attend Parliament were any sounder. They accordingly fell back on the expedient of a more rigorous application of the standing order relating to leave of absence from the House. They thought that if the existence of these arrangements was brought to the attention of all peers at the beginning of every Parliament many of the backwoodsmen could be shamed into applying for leave of absence for the duration of the whole Parliament, and having done so could hardly with decency ask to have their leave of absence cancelled when some subject like capital punishment, on which they felt strongly, came up for discussion. But the Committee were prepared to go even further than this and proposed that peers should be asked in effect to say whether or not they proposed to attend Parliament, and that those who did not take the trouble to reply should be assumed to want to have leave of absence, which would then automatically be granted to them so that unless they got it revoked they would become ineligible to attend. This can be made to look very like withdrawing the writ of summons, and, indeed, Lord Simonds argued strenuously that this is in effect what it does, so that basically it is an unconstitutional device which will deprive peers of their rights.

For some time no action was taken on the Swinton Report, but in December, 1957, the House adopted its main conclusions and in January, 1958, appointed a further Committee under Lord Merthyr to frame the necessary standing orders to give effect to them. This Committee reported in due course, recommending that the arrangements for leave of absence already outlined should be brought into effect during the present Parliament. Their report was also adopted (in April) and eventually in June of the present year the necessary Standing Order became effective.

Meanwhile it had come home to the unicameralists, and indeed to those who wanted a radically changed Second Chamber, that if the proposals of the Swinton Committee were carried into effect the House of Lords, so far from " wasting away," might acquire a new prestige and therefore new political power. Mutterings against subtle strategy in the Lords began to be heard in the Commons on the Left and the ever radical Lord Stansgate raised his voice against the proposals during the December, 1957, debate. By the time the report of Lord Merthyr's Committee came up for discussion the Parliamentary Labour Party had come to the conclusion that they were being outmanoeuvred and Lords Attlee and Silkin, who had signed the Merthyr Report, were found arguing strongly against it, saying that when they had signed they were concerned only with what was legally possible, not with what was politically desirable, and Lord Stansgate expressed the general Labour outlook on the proposal when he said it was " a bucket of paint over a structure riddled with dry rot." [23]

Indeed the Labour Opposition joined forces with Lord Simonds and the extreme Conservatives in voting against the Leave of Absence arrangements, endorsing what one might call the pure " legalistic " attitude on the writ of summons, and repudiating the " realism " of the Swinton Report. Their action was no doubt partly a protest against what they regard as a thoroughly inadequate plan for the establishment of an effective and politically satisfactory Second Chamber, and was of a piece with their earlier opposition to the Life Peerage Bill itself. But they were probably just as much concerned to prevent the present House from becoming a stronger political force, preferring to prevent this rather than to improve its legislative efficiency.

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[23] Official Reports (H. of L.), Vol. 206, col. 996.

There can be no doubt that the Conservatives regard both the new life peerages and the hoped-for elimination of the backwoodsmen as the basic elements in a plan to give the existing House of Lords a new look: the Home Secretary admitted as much in opening the debate on the second reading of the Life Peerages Bill.[24] And for this he and his party were bitterly attacked by Labour speakers both unicameralists and bicameralists, notably by Messrs. Wedgwood Benn and Aneurin Bevan. They indeed advanced the view that the Conservative strategy was three pronged, not two pronged, the third tine being what Mr. Bevan called "pelf for peers," that is the payment of salaries to those peers who attend the House, of which he regarded the recent concession of three guineas a day allowance towards expenses actually incurred by peers in attendance at the House and its Committees as the thin end of the wedge. This argument was certainly a little hard on the Conservative Chancellors of the Exchequer, who have been manfully resisting continuous and unrelenting pressure from Labour peers to do something for them for the last five or six years.[25] Moreover, it was hostile to the arguments of Labour peers during the debates on the Life Peerages Bill, for they had strenuously contended for a genuine salary such as is enjoyed by members of the Commons.[26]

It looks as if the Conservatives hope to maintain an ascendancy in the House of Lords sufficient to give them a useful though not an overwhelming advantage by means of a block of votes, perhaps two to three hundred in number, the majority of whom would be peers of first creation, an element which could fairly quickly be replaced by a similar number of life peers. This new set-up will have the advantage that the backwoodsmen will have been more or less eliminated, and the active hereditary element in the Lords will be kept so small that while it continues to supply decisive voting strength in the lobby there will be no need to be ashamed of it, or not very much, because it will be composed of good, hardworking peers whom the man in the street can respect, even if he will not admire.

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[24] Official Reports (H. of C.), *loc. cit.*, col. 411.

[25] This had also been resisted by Labour Chancellors at an even earlier period.

[26] Lord Lucas of Chilworth, for example, advocated £1,500 per annum for a small number of peers who would undertake to attend regularly.

However, the whole situation is one of such confusion that any sort of prophecy is rash in the extreme. It might seem probable that most new peers will prefer life peerages, but how can one be sure? It was rather assumed in the Commons debate that all future Labour creations would be for life only,[27] but if the choice is left to the individual this might well not be so. And among Conservatives, many of whom value highly the social position which still attaches to the peerage—a point of view which is certainly not confined to members of that party—it may well be that the majority of those offered peerages will opt for the hereditary type; assuming that they are given the choice.

Unless Prime Ministers set their faces strongly against the creation of further hereditary peers, save in very exceptional circumstances, the value of the recent developments will prove minimal as an essay in political reform. On the other hand it is not difficult to imagine a convention growing up under which the great majority of all new peers will be created for life only. This, if supplemented by another convention under which eventually all hereditary peers applied for permanent leave of absence, could produce a new House of Lords of the kind which the earlier analysis in this article seems to indicate is required for the effective working of our parliamentary system. Something of the sort was certainly envisaged by Lord Lucas of Chilworth in his speech in the Leave of Absence Debate, when he said that the proposal would " gradually eliminate the hereditary principle " from the political side of the House of Lords.[28] It must be confessed, however, that the reception given to the Swinton plan outside the House of Lords itself has been lukewarm at the best. Thus as judicious an observer as Mr. Bromhead considers that its " practical effects will probably be slight," [29] while the *New Statesman* caustically observed that " nothing sillier was ever suggested in the House of Lords . . . as no signature can override the sovereign's writ of summons the backwoodsmen's position would remain precisely as it was." [30] The odds would seem to be weighted against the success of the scheme, yet in politics more unlikely things have come true.

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[27] Thus Mr. Awberry complained that the effect of the Life Peerages Bill would be to prevent the Labour Party from creating hereditary peers: see Official Reports, *loc. cit.*, col. 629.

[28] See Official Reports (H. of L.), Vol. 206, col. 987, December 10, 1957.

[29] *Op. cit.*, p. 251.

[30] The writer thus aligns himself with the " legalistic " group. The Standing Order adopted by the House on June 16, 1958, expressly provides one month's notice of intention to resume attendance must be given, but it is true that this seems to depend on a gentleman's understanding, for the Standing Order does not in fact deal with the position of a peer who returns to the House without giving such notice, and some of the observations of Lord Home (the Leader of the House) in winding up the debate rather support the view that he could not be prevented from taking his place, which indeed seems legally to be correct.

One of the most interesting features of the recent debates was the fairly obvious agreement of all the bicameralists that the House of Lords shall continue in some form or other to be the Second Chamber in the British Parliament. That is to say there is now very little enthusiasm for the setting up of some completely new body, elected by some indirect method, as by local authorities, Chambers of Commerce, professional organisations, employers' federations, trade unions and other bodies of that kind.[31] This proposal has been generally condemned in the Labour movement [32] and so far as it was discussed in the recent debates by Conservative spokesmen seemed to be equally disliked by them. It is true that one variant of it—that of election by localities—seems to work well elsewhere, as in Sweden and Holland, but it can almost certainly be ruled out for adoption here.

If, as has been suggested above as a possibility, the creation of life peers supersedes that of hereditary peers and leave of absence for the latter becomes the rule, the problem of composition will have been solved, since any new government of a different political complexion from the last will always be able to secure a working majority in the Second Chamber without an excessive number of creations, for *ex hypothesi* its opponents will have only maintained a working majority. Sensible as this suggested development may seem it may be considered long odds against things working out in that way. Meanwhile it is perhaps unlikely that the Conservative Party would be willing to abandon altogether their present position of strength, and there may well be an attempt to secure a permanent hereditary element by some such means as the Scottish system of representative peers. At the time of the discussions in 1948 the proposal was heard that the hereditary peers should elect one tenth of their number to represent them in the House of Lords and this solution is known to find a good deal of favour among peers. It could be relied upon to produce a predominantly Conservative block of about a hundred peers which, reinforced by a similar number of life peers, would no doubt provide an effective Second Chamber. It is most unlikely, however, that the Labour Party could ever be persuaded to consent to a reform on these lines, and without such consent it seems improbable that a Conservative Government would introduce the necessary legislation.

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[31] Even Mr. Anthony Wedgwood Benn's interesting proposal for constructing a Second Chamber from Privy Councillors (see *The Privy Council as a Second Chamber* (The Fabian Society, 1957)) has received but little support. While logically this would involve the abolition of the Lords as a political institution, it would, in fact, lead to the setting up of a similar institution since most Privy Councillors are politicians.

[32] *e.g.*, by the late H. J. Laski in the Fabian pamphlet *Lords and Commons* (1947)—see also the 1954 Fabian pamphlet.

CONCLUSION

And here I am back where I started at the unwillingness of the political parties to reach a compromise solution of the House of Lords problem, an intransigence of a similar character to that existing in the international field between East and West. This is the really intractable element in the situation, and is so unsusceptible of amelioration that the Labour Party have consistently refused even to allow their leaders to meet the Conservative leaders for the purpose of exploring the possibilities of an agreed solution. They have taken the view that it is quite unrealistic to think that any such agreement can be reached.

In the meanwhile it is probably true to say that the public has grown sick and tired of the sporadic and yet protracted playing with reform. No subject has ever been up so often for discussion; never have so many bites been made at the cherry and never have the results been so puny, at any rate to the ordinary man. It is not surprising that he turns from the whole subject with a certain amount of disgust. And, anyway, why should he bother about it very much, for the institution, despite all the contempt which is poured upon it, does, as we have seen, seem to work in its own queer way. So the public will watch with amused and somewhat cynical toleration the flirtations of the Old Lady at Westminster, now that she has been through the prolonged operation of face lifting; not expecting in the result that things will be very different. I am not sure that this will turn out to be right; but it is anybody's guess.

THE DANISH PARLIAMENTARY COMMISSIONER FOR CIVIL AND MILITARY GOVERNMENT ADMINISTRATION

STEPHAN HURWITZ

INTRODUCTION

SINCE the First World War, and especially during and after the Second World War, Government administration in Denmark has increased considerably. The legislature has taken up a great variety of subjects and, according to far-reaching enabling Acts, the administration has laid down detailed rules and regulations which are often of vital importance to subjects.

This development has brought to the fore the question of protecting citizens against the mistakes or actual abuse of power by public authorities. The guarantees consisting in the civil servants' criminal and disciplinary liability and in the subjects' access to court trial or administrative appeal were according to public opinion not sufficient.

This opinion was upheld by the committee established in 1946 to consider amendments to the Constitution and the committee proposed the appointment of a "Folketingets Ombudsmand" (Parliamentary Commissioner) to supervise the civil and military administration of the State. This proposal was passed as a part of the new Constitution of June 5, 1953, section 55 of which provides:

> "Statute shall provide for the appointment by the Folketing (*i.e.*, Parliament) of one or two persons, who shall not be members of the Folketing, to supervise[1] the civil and military administration of the State."

A precedent existed in Sweden, where a "Justitieombudsman" and a "Militieombudsman," appointed by Parliament, were introduced in 1809 and in 1915 respectively.[2]

The Danish Constitutional Bill was brought into Parliament in February, 1953, together with a Bill concerning the Commissioner. Although section 55 of the Constitution made possible the appointment of two commissioners, the Bill only provided for one. For various reasons the Bill was not passed at the same time as the Constitution

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[*] The author is the first holder of the office of Parliamentary Commissioner.

[1] There is no single word in English which accurately describes the Commissioner's functions. As explained below they are to receive complaints, to investigate and report (Ed.).

[2] In Finland a parliamentary "Justitieombudsman" was introduced in 1919.

but a year after as Act No. 203 of June 11, 1954,[3] and on March 29, 1955, the present writer was elected to be the first Commissioner and took office on April 1, 1955.

In pursuance of section 3 of the Act, Parliament on March 22, 1956, adopted detailed Directives for the Commissioner's activities.[4]

THE COMMISSIONER'S JURISDICTION AND POWERS

The Commissioner's task is first of all to supervise all State administration. His jurisdiction comprises the Ministers, the civil servants and all other persons acting in the service of the State. In the interests of the independence of the courts, judges, however, are kept outside the Commissioner's jurisdiction, and the same applies to the deputy judges in so far as complaints against their official conduct can be brought before a special Court of Complaints.

Nor is the municipal administration within the jurisdiction of the Commissioner, though the extension of his jurisdiction to include municipal affairs also is now being considered.[5]

According to section 3 of the Directives the Commissioner " shall keep himself informed as to whether any person, within his jurisdiction, pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties."

To perform his task the Commissioner has very wide powers. He is entitled on receipt of a complaint or on his own initiative to examine any civil or military activity which is performed in the service of the State and comes within his jurisdiction. Furthermore, he may inspect any office under the State, and every person in Government service is obliged to supply him with such information and to produce any documents and records which he may require for the performance of his duties.

If the Commissioner after an investigation finds that a Minister or former Minister should be called on to account, under civil or criminal law, for his official conduct, he submits a recommendation to that effect to Parliament. If the Commissioner considers that other persons within his jurisdiction have committed criminal offences in the course of their public or official service he may instruct the prosecuting authorities to institute preliminary investigations and to bring a charge before the ordinary courts.

If, furthermore, the Commissioner finds that the misconduct of a civil servant renders necessary a disciplinary prosecution he may direct the administrative authority concerned to institute disciplinary investigations.

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[3] The text of the Act is printed below as Annex 1.

[4] Printed below as Annex 2.

[5] See below, p. 244.

It should be said, however, that these last-mentioned powers will hardly become of great practical importance. The high standard of the Danish civil servant has made the institution of criminal action for crimes in public service an unusual event, and although every year disciplinary investigations are made the numbers of such investigations are very small compared with the total number of civil servants. Thus it has never been necessary so far to use the powers of the Commissioner to institute criminal or disciplinary prosecutions.

In practice it has appeared that the authority which has been of the greatest importance to the Commissioner is that granted to him by section 9 of the Act and reinforced by section 10 of the Directives. According to these provisions the Commissioner may always give his opinion on a complaint to the person complained of.

By calling attention to committed errors the Commissioner is enabled to exercise a guiding influence on the administration. Furthermore, where the Commissioner considers a particular decision to be erroneous, the provisions give him the legal authority to initiate negotiations with the authority concerned so that the decision may be corrected. If, however, because of the character of the case or the decision, correction is not possible, the case will often give the Commissioner an occasion to discuss with the authorities a revision of the general procedure.

In this connection it may be mentioned that according to section 7 (3) of the Directives the Commissioner may recommend that a complainant be granted free legal aid where he intends to bring an action against a State authority or person acting or having acted in the service of the State in respect of alleged errors or negligence in such service. Naturally this power is used with great care.

It must, however, be stressed that in no case has the Commissioner authority to change an administrative decision. The function of the Commissioner is to supervise and not to act as a court of appeal or cassation. The administration is not bound to follow the Commissioner's recommendations, and in the case of a refusal the only thing left for him is to report the matter to Parliament, which may take up the question with the responsible Minister. So far the administration in the vast majority of cases has been ready to comply with the Commissioner's requests whether they have concerned special cases or general questions regarding the administrative practice or procedure.

Besides this supervision of the administration the Commissioner has the authority to notify Parliament and the Minister concerned of cases where, in his opinion, defects are revealed in existing laws or administrative regulations, and in the same way he may propose such measures as he deems useful to promote law and order or to improve Government administration. This, however, does not mean that the Commissioner may introduce regular Bills in Parliament. Nor should he in any way state his opinion about political questions, but he may draw the attention of Parliament to such errors or imperfections in an Act which it may be assumed have escaped the notice of Parliament.

RELATION TO PARLIAMENT

As already mentioned the Commissioner is appointed by Parliament. To secure his independence it is provided that he shall not hold any office in the public service or in private firms, enterprises or institutions except with the consent of the below-mentioned parliamentary committee.

Usually the Commissioner is appointed after every general election, but Parliament may at any time dismiss a Commissioner who no longer has its confidence and appoint a new Commissioner.

This, however, does not mean that Parliament may interfere with the Commissioner's handling of individual cases. As expressly stated in section 3 of the Act the Commissioner is—apart from the general Directives—independent of Parliament in the performance of his duties.

The Commissioner's independence in relation to Parliament has also found expression in section 13 of the Act, according to which the Commissioner engages and dismisses his own staff. The number, salaries and pensions of the staff are, however, fixed by Parliament. At present the staff consists of ten persons, five of whom are legally qualified.

The Commissioner's supervision of the administration is made on behalf of Parliament, and accordingly, he is obliged to inform Parliament and the appropriate Minister of cases in which his investigations have revealed that any person coming within his jurisdiction has committed mistakes or acts of negligence of major importance.

Furthermore, the Commissioner each year submits a report to Parliament on his activities in the preceding calendar year. In this report, which is printed and published, the Commissioner records his decisions in individual cases which may be of general interest.

To protect civil servants it is prescribed that if the Commissioner's report or information submitted to Parliament or a Minister contains criticism of any person or administrative agency the report or information shall state what the person or agency concerned has pleaded by way of defence. If further in his report the Commissioner mentions cases where he has found the complaint groundless the name and address of the person complained of must not be mentioned, unless he has expressed a desire to that effect.

To facilitate contact with the Commissioner Parliament has appointed a special committee through which the reports and information regarding special cases are submitted to Parliament. As a rule the committee invites the Commissioner to attend the meetings.

THE HANDLING OF THE COMPLAINTS

According to section 6 of the Act the Commissioner may take up a matter for investigation on his own initiative. So far this authority has been used in only a few cases, for instance when the press has brought a matter concerning the administration before the public. Usually, however, investigations are initiated upon receipt of a complaint.

Any person may lodge a complaint without having to show any special interest in the matter concerned, but naturally the Commissioner will be rather reluctant in taking up a complaint for examination if it is evident that the complainant has no legal or reasonable interest.

Civil servants are not debarred from complaining, nor are they obliged to forward the complaint through the official channels but may send it direct to the Commissioner. In fact, a rather large part of the cases comes from civil servants, usually of the lower grades, who are dissatisfied with the conditions of their service.

Further, according to section 6 of the Act, any person deprived of his personal liberty is entitled to address written communications in sealed envelopes to the Commissioner.

In this connection it should be mentioned, too, that during the last two years I have inspected several prisons and penal institutions. Usually these inspections are announced in advance, and the prisoners are informed that they will have an opportunity of talking to the Commissioner without the presence of any officials from the prison. Although the complaints of the prisoners usually do not prove justified I attach importance to such talks, as they give the prisoners an opportunity of discussing questions which have troubled them with a person whom they do not consider as a representative of those who have imprisoned them, or of the prison authorities.

In pursuance of section 71 (7) of the Constitution, Parliament has appointed a Supervisory Board regarding the treatment of persons who out of court are deprived of their liberty (*e.g.*, persons detained in mental hospitals or in homes for the mentally deficient). It is provided in section 4 of the Directives that the Commissioner shall refer complaints about the treatment of such persons to the Board, which on the other hand may call upon the Commissioner to consider complaints directed against any person or institution acting in the service of the State. The collaboration with the Board has been excellent.

Regarding the form of the complaints it is prescribed that they should, as far as possible, be submitted in writing and be accompanied by the complainant's evidence. Further, the name and address of the complainant must be stated. It has happened that a complainant who has stated his name to the Commissioner has for special reasons asked to have his name kept secret from the authorities. In such cases the Commissioner decides whether he finds it reasonable to comply with this wish.

According to section 6 of the Act the complaint must be lodged not more than one year after the date on which the subject-matter of the complaint was committed. This time limit, however, is not absolute, as no time limit has been imposed in matters which the Commissioner decides to investigate on his own initiative.

When a complaint has been received at the Commissioner's office it is as quickly as possible subjected to a first examination with a view to decide whether to proceed with a regular investigation or not. In making this decision the Commissioner is the sole competent authority. As a result of the examination about 50 per cent. of the complaints are for various reasons dismissed without further investigation. Of the dismissals, a great number are due to the fact that the complaints concern persons or matters outside the Commissioner's jurisdiction. Typical examples hereof are complaints concerning court judgments or the conduct of judges as well as complaints regarding Parliament, municipal administration or private affairs. It is, however, not always easy to define the jurisdiction of the Commissioner, especially towards municipal administration, as the position of some officials or institutions is of a mixed governmental and municipal character.

In some of the above-mentioned cases the complainants are told to what authorities they could apply, or the complaints are referred to the competent authority. This is especially the case where a complaint concerns the municipal administration

If the Commissioner finds that he cannot dismiss a complaint immediately, it is usually referred to the person or service branch concerned together with a request for the forwarding of a statement and all documents and records of the case. When these documents are received the matter is examined carefully at the Commissioner's office, and if it is found necessary the Commissioner holds personal interviews with the complainant, the civil servant complained of, the responsible authority and perhaps other persons who may be able to give relevant information. These interviews usually take place as rather informal talks in the Commissioner's office, and so far it has not been necessary to use the Commissioner's power to summon witnesses before a court.

During the investigation the civil servants are given full opportunity to defend themselves, and as a special protection section 7 (3) of the Act provides that the civil servant complained of at any time may demand that the matter shall be referred to a disciplinary investigation under the provisions of the Civil Servants Act. In such a case the Commissioner will discontinue his investigation and transmit the case to the appropriate administrative authority, stating what has happened and enclosing the information obtained. So far no civil servants have made use of this right.

When the investigation is finished the Commissioner will make his decision and inform the parties of the result. The decision is usually given in the form of a letter to the complainant, in which the Commissioner gives a detailed statement of the facts of the case and of the reasons for his conclusion. Copies of the letter are sent to the civil servant and the authorities concerned, and if the Commissioner has found anything to criticise their attention is especially drawn thereto.

With the Commissioner's decision the matter is closed, as there is no appeal to a higher authority against the decision.

NUMBER AND NATURE OF CASES

The number of cases has been somewhat growing from year to year. In 1955 (April–December) the Commissioner received 565 complaints of which 315 were taken up for regular investigation. In 1956 the similar numbers were 869 and 438 respectively, and in 1957 about 1,025 complaints were received. The number of investigations that year was about 50 per cent. of the total number of complaints. During the first four months of 1958 the rate of the number of complaints continued to increase.

The result of the investigations is usually that there is found to be no basis for criticism either of the civil servants or of the service branch. This does not mean that these complaints have always been unreasonable. As the administration will often indicate no reason for its decisions, and as the complainant will often have an incomplete knowledge of the facts of the case or be unable to appreciate the facts, he does not understand the decision which he maybe finds unreasonable or unjust. By giving the complainant an explanation it has often been possible for the Commissioner to set his mind at rest.

In about 10 per cent. of the investigated cases the Commissioner has found it necessary to make criticisms or to put forward recommendations of one kind or another to the authority concerned. This may be thought to be a rather small percentage of the total number of cases investigated, but in appreciating the Commissioner's work it should be realised that it is not only the number of such cases that counts but also and perhaps mostly the preventive effect of his office on the administration and through that an increased confidence in the soundness of the administration and its decisions.

The complaints received cover the whole field of administration. The greatest part concerns the Ministries (and here especially the Ministries of Justice and of Finance), the local State authorities and the police. Before the passing of the Bill some members of Parliament gave expression to the fear that the new institution might victimise the minor civil servant who used his common sense and perhaps failed to follow the rules and regulations in all details.

In my opinion these fears have proved to be unfounded. Certainly, the Commissioner receives complaints against minor civil servants, but they are only a small part of the total number of complaints. The majority of these are not directed against the single civil servant, be he of a higher or lower grade, but against the institutions, and as mentioned above, especially against the Ministries. The reason for this is perhaps that usually it is possible to appeal against a decision to a higher authority and eventually to the Minister. Although the person who is dissatisfied with a decision may immediately submit the matter to the Commissioner, he will very often prefer to try the usual possibilities of administrative appeal before going to the Commissioner.

I do not believe that the administration, during the three years in which I have acted, has been more inclined to stick too rigidly to the letters of the statutes or rules.

At the beginning many civil servants certainly regarded the Commissioner with some scepticism, but I have endeavoured not to take a formalistic point of view in considering the cases, and it is my feeling that members of the civil service are aware of that, and that the sceptics are retreating.

It has also been said that the Commissioner's office would be a rallying-ground for the more quarrelsome individuals or professional troublemakers. Naturally the Commissioner has received some complaints which may only be characterised as quarrelsome, but often it has been possible to dismiss such complaints without further investigation.

It is difficult in a short article to give an impression of the nature of the cases dealt with, but one class of cases deserves special attention because of the difficulties they have involved. They are cases in which the decision of the administration does not depend on the application of a rule of law but is left in the discretion of the administration.

This class of cases covers a very wide field, and hitherto the courts have only been able to attack such decisions in very few cases. The Danish courts have consistently refused to re-examine such decisions, if they might be held to fall within the limits of the discretion granted by the legislature to the administrative services and provided that it could not be proved that an unlawful end had been pursued (*détournement de pouvoirs*).

In handling cases of this kind it is also difficult for the Commissioner to criticise. As an example may be mentioned the fact that it is often left to the administration to fix the alimony or maintenance payable by a man to his former wife or his legitimate or illegitimate children. It will easily be understood that it is almost impossible for the Commissioner to criticise the amount of this obligation.

If, however, in a case of the above-mentioned kind the Commissioner finds that the decision is arbitrary or unreasonable, section 3 of the Directives gives him a legal basis for criticism, although the courts in similar cases would abstain from censure.

As a special point it may be mentioned that in some cases it has been revealed that instead of exercising a discretion in each individual case, as it should do, the administration follows a firm rule established in practice. In such cases the Commissioner has questioned the decision and recommended reconsideration.

THE COMMISSIONER AND THE MUNICIPAL ADMINISTRATION

As mentioned above the municipal administration is outside the Commissioner's jurisdiction. In the last year, however, the question has been raised of extending his jurisdiction to cover this administration also.

There are, in my opinion, good reasons for such an extension. In Denmark the State and the municipal administration often work together. As an example it may be mentioned that the lowest tax-authorities are municipal whereas the higher ones are Government agencies. In dealing with the cases it is unsatisfactory that the Commissioner is not able to criticise the activities of the lower authorities but only those of the higher.

It is also difficult for the citizens to understand that the Commissioner may investigate a complaint against a teacher at a State school but not a quite similar complaint against a teacher who is engaged by a municipally conducted school. The same applies for instance to hospitals, some of which are run by the State, others by municipal authorities.

The municipal organisations have until now resisted the extension of the Commissioner's jurisdiction and have argued that an extension might be an attack on local autonomy. Further they have pointed out that through the possibilities for appeal against municipal decisions the citizens have sufficient security that their rights are not violated. In my opinion these arguments cannot be decisive. As the Commissioner cannot himself modify the decisions it is difficult to see how his subsequent control may constitute an interference with local autonomy, and even though it is sometimes possible to appeal against a municipal decision it would in the last resort be more satisfying to all parties if the Commissioner could also judge the administrative activities on the municipal level. In this connection it has also been suggested that the Commissioner should not have jurisdiction before all possibilities for appeal were exhausted.

Parliament has not yet decided whether to extend the Commissioner's jurisdiction, but it is my impression that a decision in this direction will be made. It is here of interest that in May, 1957, the Swedish Commissioner's jurisdiction was extended to cover to some extent the municipal administration.

CONCLUSION

The Commissioner's office may still be considered as a not yet fully established institution in Danish constitutional life. Quite naturally there have been some initial difficulties, but these may now be considered to be overcome.

A condition for the due functioning of the new institution has been that it enjoyed the confidence of Parliament, the administrative authorities and the public as a whole. In an article which I wrote after having acted for one year I stated that the central administration and its local branches had shown their readiness for loyal co-operation, and this statement I can only confirm now after three years in office. The friendly attitude which, from the beginning, the Press has shown the new institution has not changed. The work is still followed by the Press with great interest, and the Commissioner's decisions are often recorded and commented on in the newspapers.

Summing up our experience my staff and I are convinced that the new institution " Folketingets Ombudsmand," has helped and will continue to help in building, or rather maintaining, a sound administration in Danish democracy.

ANNEX 1

Act No. 203 of June 11, 1954, on the Parliamentary Commissioner for Civil and Military Government Administration

Section 1

After every general election the Folketing [parliament] shall appoint a Parliamentary Commissioner who, on behalf of the

Folketing, shall supervise the civil and military government administration (hereinafter called the "Parliamentary Commissioner"). Judges shall, in the conduct of their office, be entirely outside the jurisdiction of the Parliamentary Commissioner.

If the Parliamentary Commissioner no longer has the confidence of the Folketing, the latter may dismiss him and appoint a new Parliamentary Commissioner.

Section 2

The Parliamentary Commissioner, who shall not be a member of the Folketing, shall be legally qualified.

Section 3

The Folketing shall lay down general rules for the Parliamentary Commissioner's activities. Subject to such rules, he shall, in the performance of his duties, be independent of the Folketing.

Section 4

The Parliamentary Commissioner's jurisdiction shall comprise Ministers, civil servants and all other persons acting in the service of the State, except as provided by Section 1, para. 1.

Section 5

The Parliamentary Commissioner shall keep himself informed as to whether the persons mentioned in Section 4 commit mistakes or acts of negligence in the performance of their duties.

Section 6

Complaints against the persons mentioned in Section 4 may be lodged with the Parliamentary Commissioner by any person. The complainant shall state his name and lodge his complaint not later than one year after the date on which the subject-matter of the complaint was committed. The Parliamentary Commissioner shall decide whether the complaint gives sufficient grounds for an investigation. The Parliamentary Commissioner may also take up a matter for investigation on his own initiative. Any person deprived of his personal liberty is entitled to address written communications in sealed envelopes to the Parliamentary Commissioner.

Section 7

The persons mentioned in Section 4 shall be under the obligation to furnish the Parliamentary Commissioner with such information and to produce such documents and records as he may demand by virtue of his office.

Demands for information made by the Parliamentary Commissioner in pursuance of subsection (1) shall be subject to limitations similar to those laid down by the Administration of Justice Act,

s. 169 (1) and (3), s. 170 (1), the principal rule in s. 170 (4), and s. 749.

If the Parliamentary Commissioner wishes to take action on a complaint against any of the persons mentioned in Section 4, the complaint shall, as soon as possible, be communicated to the person concerned, unless this is absolutely incompatible with the investigation of the matter. The person concerned may, if he is a civil servant, demand at any time that the matter shall be dealt with under the provisions of the Civil Servants Act, s. 17, *cf.* s. 18.

The Parliamentary Commissioner may subpoena persons to give evidence before a court of law on any matter which has bearing on his investigation. This procedure shall be subject to the rules governing examination of witnesses for investigation purposes, *cf.* the Administration of Justice Act, Chap. 74. Such court sessions are not open to the public. The person whom a complaint concerns is entitled to attend such examinations himself and to be represented by counsel. The rules in force at any time governing the payment of costs for a counsel, etc., in disciplinary prosecution of civil servants shall be applicable by analogy.

Section 8

The Parliamentary Commissioner shall observe secrecy in any matter coming to his knowledge in the performance of his duty, provided that such secrecy is necessary *ipso facto*. The obligation to observe secrecy shall not lapse when he resigns his office.

Section 9

The Parliamentary Commissioner may order the prosecuting authorities to institute preliminary proceedings or to bring a charge before the ordinary law courts for misconduct in public service or office, subject to sections 16 and 60 of the Constitution (the Court of the Realm).

The Parliamentary Commissioner may order the administrative authority concerned to institute disciplinary proceedings.

In any case, the Parliamentary Commissioner may always state his views on the matter to the person concerned.

Section 10

If any mistake or act of negligence of major importance, committed by any of the persons mentioned in Section 4, comes to the knowledge of the Parliamentary Commissioner, the latter shall inform the Folketing and the Minister concerned hereof.

The Parliamentary Commissioner shall submit an annual report on his activities to the Folketing. The report shall be printed and published.

If the Parliamentary Commissioner informs the Folketing or a Minister of a case, or if he refers to a case in his annual report, he shall, in such information or in his report, state what the person concerned has pleaded by way of defence.

Section 11

If the Parliamentary Commissioner becomes aware of any defects in existing laws or administrative regulations, he shall inform the Folketing and the Minister concerned.

Section 12

The Parliamentary Commissioner shall receive remuneration at the same rate as a judge of the Supreme Court at the highest grade in the salary scale. In addition, he may be granted a personal allowance of such amount as circumstances may warrant. He is entitled to "waiting money"[1] and to a pension according to provisions corresponding to those laid down in the Act on Remuneration and Pensions, etc., for Ministers, Sections 3–6.

The Parliamentary Commissioner shall not hold any office in public or private firms, enterprises or institutions, except with the consent of a committee which the Folketing has instructed to determine this question.

Section 13

The Parliamentary Commissioner shall engage and dismiss his staff. The number, salaries and pensions of his staff members shall be fixed in the same manner as that prescribed in the Folketing's Rules of Procedure for its own officials, etc. The expenditure incidental to the Parliamentary Commissioner's Office shall be charged to the budget of the Folketing.

Section 14

This Act shall come into operation on November 1, 1954.

Section 15

This Act shall be submitted to the Folketing for revision not later than the parliamentary year 1956/57.[2]

ANNEX 2

Directives for the Parliamentary Commissioner for Civil and Military Government Administration

Adopted by the Folketing, March 22, 1956.

The following directives for the Parliamentary Commissioner for Civil and Military Government Administration (hereinafter called the "Parliamentary Commissioner") are issued in pursuance of Act No. 203 of June 11, 1954, s. 3.

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[1] Compensation payable to Government officials who are temporarily out of office.

[2] By Act No. 71 of March 29, 1957, the words "parliamentary year 1956/57" were amended to read "parliamentary year 1957/58."

Article 1

The Parliamentary Commissioner shall, on behalf of the Folketing [parliament], keep himself informed of the civil and military government administration.

Article 2

1. The Parliamentary Commissioner's jurisdiction shall comprise Ministers, civil servants and all other persons acting in the service of the State, except as provided in paragraphs 2 and 3.

2. Judges shall, in the conduct of their office, be entirely outside the jurisdiction of the Parliamentary Commissioner. Deputy judges, on the other hand, come within the Parliamentary Commissioner's jurisdiction in so far as complaints against the conduct of their office cannot be brought before the New Trials Court.

3. The civil servants of the Established Church come under the Parliamentary Commissioner's jurisdiction, except in matters which directly or indirectly involve the tenets or preachings of the Church.

Article 3

1. The Parliamentary Commissioner shall keep himself informed as to whether any person within his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties.

2. The Parliamentary Commissioner shall be entitled to examine, by request or on his own initiative, any civil and military action performed in the service of the State and coming within his jurisdiction.

3. The Parliamentary Commissioner shall be entitled to inspect any State agency; subject to limitations similar to those laid down in the Administration of Justice Act, s. 749 (1), he shall have access to all premises.

4. Any person acting in the service of the State shall be under the obligation to furnish the Parliamentary Commissioner with such information and to produce such documents and records as he may demand for the performance of his duties.

5. Demands for information made by the Parliamentary Commissioner in pursuance of paragraph 4 shall be subject to the limitations involved by Article 2, paras. 2 and 3, and to limitations similar to those laid down by the Administration of Justice Act, s. 169 (1) and (3), s. 170 (1), the principal rule in section 170 (4) and section 749.

Article 4

1. Any person deprived of his or her personal liberty shall be entitled to address written communications in sealed envelopes to the Parliamentary Commissioner.

2. Complaints about the treatment of persons deprived of their personal liberty through any procedure other than administration of criminal justice, shall be referred to the Supervisory Board appointed by the Folketing in pursuance of the Constitution, s. 71 (7); the Supervisory Board may invoke the assistance of the Parliamentary Commissioner in the consideration of such complaints if the latter are made against any person acting in the service of the State.

Article 5

1. Any person may complain directly to the Parliamentary Commissioner against persons or about a subject-matter which come within his jurisdiction; any such complaint should, as far as possible, be submitted in writing and be accompanied by the complainant's evidence.

2. The complainant's name and address shall be stated in the complaint which shall be lodged not later than one year after the date on which the subject-matter of the complaint was committed.

Article 6

If a complaint concerns persons or subject-matter not within the Parliamentary Commissioner's jurisdiction, or if the complaint has been lodged too late, the Parliamentary Commissioner shall inform the complainant that he can take no action on the complaint. The Parliamentary Commissioner may, however, refer any such complaint to the appropriate authority and give the complainant reasonable guidance.

Article 7

1. If the Parliamentary Commissioner finds that a complaint which comes within his jurisdiction is unfounded or that the subject-matter of the complaint is quite insignificant, he shall as soon as possible inform the complainant that he finds no reason to take action in the matter.

2. In cases where the subject-matter of a complaint may be referred to a special authority, the Parliamentary Commissioner shall take steps to have the matter referred to that authority before he takes any further action.

3. If the Parliamentary Commissioner finds that the examination of the subject-matter of a complaint comes within the jurisdiction of the law courts, he may give guidance to the complainant. In cases where the complainant intends to bring an action against a State authority or against any person acting, or having acted, in the service of the State, in respect of alleged mistakes or negligence in such service, the Parliamentary Commissioner may, subject to the stipulations of the Administration of Justice Act, Chap. 31, recommend that the complainant be granted free legal aid.

Article 8

1. If the Parliamentary Commissioner finds that a complaint should be taken up for examination, the party involved shall, as soon as possible, be informed of the complaint, possibly through the appropriate administrative authority, and asked to make a statement on the complaint, unless this procedure would be absolutely incompatible with the investigation of the matter.

2. Subject to the rules in Article 3, para. 5, the Parliamentary Commissioner may demand written declarations and other information from the person against whom a complaint has been lodged, and from his superior.

3. The Parliamentary Commissioner may subpoena persons to appear and give evidence before a court of law about matters which have bearing upon his investigations. This procedure shall be subject to the rules governing examination of witnesses for investigation purposes, *cf.* Chapter 74 of the Administration of Justice Act. Such court sessions are not open to the public. The Parliamentary Commissioner may attend such examinations in person or by proxy. The person whom a complaint concerns is entitled to be represented by counsel, and he shall be advised to that effect in the writ of subpoena for the first sitting of the court. The writ of subpoena shall give proper notice. The Minister of Justice shall issue rules as to who may act as counsel.

4. The rules in force at any time governing the payment of costs for counsel, etc., in disciplinary prosecution of civil servants shall be applicable by analogy.

Article 9

1. If the Parliamentary Commissioner has indicated that he will take action on a complaint against a civil servant, the latter may at any time demand that the matter be referred for disciplinary investigation under the provisions of the Civil Servants Act, s. 17, *cf.* s. 18. The Parliamentary Commissioner shall then discontinue his investigation and transmit the case to the appropriate administrative authority, stating what has happened and enclosing the information obtained.

2. This shall apply also if the administrative authority concerned initiates a disciplinary investigation or if a police investigation is instituted to ascertain if a punishable offence has been committed.

3. In the cases referred to in paragraphs 1 and 2 the Parliamentary Commissioner is entitled to demand that copies of records of examinations held in disciplinary investigations as well as copies of police reports and court records be sent him immediately and that he be informed about the outcome of the investigations made.

Article 10

1. If the Parliamentary Commissioner, on having made an investigation, finds that a Minister or a former Minister should be

held responsible, under civil or criminal law, for his official conduct, he shall submit a recommendation to that effect to the Folketing's Committee on the Parliamentary Commissioner's Office.

2. If the Parliamentary Commissioner deems that other persons coming within his jurisdiction have committed crimes in public or official service (Penal Code, Chap. 16), he may order the prosecuting authorities to institute preliminary investigations and to bring a charge before the ordinary law courts.

3. If the Parliamentary Commissioner finds that the misconduct of a civil servant is of such a nature as to warrant disciplinary prosecution, he may order the administrative authority concerned to institute disciplinary investigations.

4. Even if the subject-matter of a complaint gives the Parliamentary Commissioner no occasion for action, he may always state his views on the matter to the person whom the complaint concerns.

Article 11

1. The Parliamentary Commissioner shall call the attention of the Folketing's Committee on the Parliamentary Commissioner's Office and the appropriate Minister to cases where he considers existing laws and administrative regulations to be inadequate. At the same time, he may propose such measures as he considers useful to promote law and order or to improve the central administration.

2. The Parliamentary Commissioner may request the Folketing's Committee on the Parliamentary Commissioner's Office to transmit to the Folketing his communications to the Committee.

Article 12

If the Parliamentary Commissioner's investigations of a case reveal that any person coming within his jurisdiction has committed mistakes or acts of negligence of major importance, he shall inform the Folketing's Committee on the Parliamentary Commissioner's Office and the appropriate Minister of the matter.

Article 13

1. By the end of September each year, the Parliamentary Commissioner shall submit to the Folketing a report on his activities in the preceding calendar year. The report shall be printed and published. In that report, he shall, *inter alia*, record decisions in individual cases which may be of general interest; he shall also mention the cases referred to in Articles 11 and 12 about which information has been transmitted to the Folketing's Committee on the Parliamentary Commissioner's Office, and to the Ministers concerned.

2. If any case which is mentioned in the report, or about which information has been transmitted to the Folketing's Committee on the Parliamentary Commissioner's Office or to a Minister, contains

criticism of any person or administrative sector, such report or such information shall show what the person or the sector concerned pleaded by way of defence.

3. If in his report the Parliamentary Commissioner mentions cases where he found a complaint unfounded, the name or address of the person whom the complaint concerns shall not be mentioned unless he has expressed a desire for such mention.

Article 14

The Parliamentary Commissioner shall engage and dismiss his staff, whose number, salaries and pensions shall be fixed in the same manner as that prescribed in the Folketing's Rules of Procedure for its own officials, etc.

Article 15

1. The Parliamentary Commissioner shall observe secrecy about any matter coming to his knowledge in the performance of his duty, provided that such secrecy is necessary *ipso facto*. The staff engaged by the Parliamentary Commissioner shall be bound by the same obligation.

2. The obligation to observe secrecy shall exist also after resignation or retirement.

Article 16

1. The Parliamentary Commissioner shall not be a member of the Folketing.

2. The Parliamentary Commissioner shall not, except with the consent of the Folketing's Committee on the Parliamentary Commissioner's Office, hold any office in public or private firms, undertakings, or institutions.

3. Subject to the limitations laid down in these Directives, the Parliamentary Commissioner shall, in the performance of his duties, be independent of the Folketing.

DRAFT ADMINISTRATIVE JURISDICTION BILL FOR THE STATE OF ISRAEL

Introduction

THE following is a translation from the Hebrew of a preliminary draft of an Administrative Jurisdiction Bill for the State of Israel and accompanying Explanatory Notes. This draft was prepared by the Ministry of Justice for internal circulation among various departments of the Israeli Government, and was not intended to be a final version of the Bill.

Even in this preliminary form, however, the Bill exhibits an interesting approach to the problem of judicial review of decisions of administrative agencies. It combines what might be described as the structure of a system recently proposed in England and the substance of the French system, by reconstituting an ordinary court as an administrative tribunal with broad powers of review.[1]

The Proposed Law

A. *Title*

Administrative Jurisdiction Bill, 1958

B. *Provisions of the Law*

1. Decisions made under provisions of those laws enumerated in the first column of the Schedule [2] by one of the authorities enumerated in the second column of the Schedule (hereinafter—administrative decisions) may be appealed to a District Court sitting as an Administrative Court.

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[1] The text and notes of the Bill were prepared by the Ministry of Justice, Israel. They have been translated by the Harvard-Brandeis Co-operative Research on Israel's Legal Development which has previously distributed drafts of four comprehensive codes prepared in Israel—an Evidence Bill, a Succession Bill, a Family Code and a Companies Bill. The English translation of this new Administrative Jurisdiction Bill was prepared because of the interest which it was thought the Bill would hold for members of the legal profession in the U.S.A. and elsewhere. Since this new draft may soon be considered by the Knesset, persons interested in making comments or suggestions are urged to do so at their earliest convenience. Comments may be submitted to the Harvard Law School or directly to Dr. Uri Yadin, Ministry of Justice, Jerusalem, Israel.

[2] The Schedule which has here been omitted contains a list of various existing enactments which provide for decisions by administrative agencies. This list is divided as follows: fiscal enactments, enactments relating to expropriation; enactments relating to disability grants and rehabilitation; enactments relating to labour and pensions; and enactments relating to licensing and controls.

2. The venue of the Administrative Court shall be determined by the place where the authority which made the administrative decision (hereinafter—the administrative authority) has its official seat.

3.—(*a*) In appeals from administrative decisions the District Court shall consist of one judge or of one judge and two assessors as detailed in the third column of the Schedule.

(*b*) The Minister of Justice in consultation with the Minister responsible for the implementation of the enactment concerned shall prepare lists of assessors for the various kinds of cases; the President of the District Court will select the assessors for each case from these lists.

(*c*) Notwithstanding anything said in subsection (*a*) a judge, without the assistance of assessors, may dispose of appeals in which only legal questions arise, as well as applications for interlocutory orders, intermediate orders, and other provisional decisions involved in an appeal.

4. In cases where assessors sit on the Administrative Court, the District Court judge shall preside.

5. In appeals from administrative decisions the District Court shall have the following powers:

(1) to consider *de novo* the issues which were raised before the administrative authority, issues of policy excluded, and it shall not be bound by the findings of the administrative authority;

(2) to weigh *de novo* the evidence submitted in the case, and to admit evidence which would not have been admissible in another proceeding;

(3) to approve the administrative decision, to reverse it, to remand the case to the administrative authority or to render any decision which the administrative authority had power to make.

6. The judgment of the District Court on an appeal from an administrative decision may be appealed to the Supreme Court.

7. The Minister of Justice is responsible for the implementation of this law and he may make regulations as to any matter relating to such implementation: among others, regulations as to the modes for filing the appeal, the time limits therefor and the procedure in dealing therewith.

8. The enactments enumerated in the first column of the Schedule are hereby amended as detailed in the last column of the Schedule.

9. The Minister of Justice may, by order, amend the Schedule by adding enactments, authorities or decisions, to which this law shall

apply, or by deleting such enactments, authorities or decisions, and he may effect in these enactments, the amendments necessitated by such addition or deletion.

C. *Objects and the Reasons for its Enactment*

The purpose of this Bill is to establish an Administrative Court which will constitute a division of the District Courts. Judicial review of designated administrative decisions will be centralised in the jurisdiction of this court.

The establishment of the new arrangement will standardise the proceedings which at present take place in scores of different appeal or objection committees. It will also lead to essential changes in the scope and character of judicial review. The avowed purpose is to broaden the existing powers of review even to the extent of granting a full right of appeal from an administrative decision on matters of substance.

The Bill is modelled on similar Bills in England and the United States. In England, two years ago, a Bill entitled " Liberties of the Subject " was proposed which provided for the establishment of an administrative division of the courts.

The English Franks Committee which published its report some months ago (Cmnd. 218, 1957) also stressed its positive approach to such a solution by stating: " We wish to emphasise that in deciding by whom adjudications involving the administration and the individual citizen should be carried out preference should be given to the ordinary courts of law rather than to a tribunal unless there are demonstrably special reasons which make a tribunal more appropriate, namely, the need for cheapness, accessibility, freedom from technicality, expedition and expert knowledge of a particular subject."

In the same connection, it may also be worthwhile to mention the recommendations in the United States of the Hoover Commission Report of 1954.

The Bill does not adopt the system of review of administrative decisions which exists in France. The structure of the administrative judiciary as an arm of administrative agencies and its embodiment in the State Council (Conseil d'Etat), the composition of the State Council, its place among the governing authorities and the pattern of its development, are all too foreign to the system of administration and judiciary in Israel to be imported in their entirety. The Bill does not adopt the structure of this system; yet with respect to the character of judicial review and its scope, the Bill follows the French system which grants very broad powers to the State Council.

THE PRESENT SITUATION

A. *Administrative Tribunals*

Since the establishment of the State about thirty appeal committees have been created by various enactments—in addition to some that had already existed under the British Mandate. For example, appeal committees (objections committees, tribunals) at present exist under the following types of enactments: fiscal enactments—the Municipal Corporations Ordinance, 1937, the Urban Property Tax Ordinance, 1940, the Compulsory Loan Law, 1953; disability grants and rehabilitation laws—the Invalids (Disability Grants and Rehabilitation) Law, 1949; laws relating to labour and pensions—the Ex-Servicemen (Return to Work) Law, 1949, the National Insurance Law, 1953, the Civil Service (Pensions) Law, 1955; and laws relating to controls and licensing—the Electricity Law, 1954, the Explosives Law, 1954. In addition to these, a few committees exist under emergency laws (or regulations), such as the Emergency Land Requisition (Regulation) Law, 1949.

In addition to these enactments, there are some laws under which judicial review of an administrative decision is handled directly by the District Court and not by an appeal committee. Thus, for example, an appeal lies to the District Court from a decision of the Assessment Officer under the Income Tax Ordinance, 1947, and from a decision of the Estate Tax Director under the Estate Tax Law, 1949. Additional examples for such practice can be found in some other spheres of law, not involving fiscal matters, *e.g.*, with respect to compensation under the Roads and Railways (Defence and Development) Ordinance, 1943 (as amended in 1951).

1. *Composition of the committees*

An appeal committee usually consists of a chairman who is a person with a broad legal background (magistrate, District Court judge or a person qualified to hold such appointments) and two other members appointed by the Minister responsible for the implementation of the particular law from among higher government officials or representatives of the public. Sometimes one of the two assessors is required to be an expert in the matter brought before the committee; for instance, in cases of disability grants and rehabilitation matters one of the committee members is a physician.

2. *Committee procedure*

The procedure is generally prescribed in regulations which also prescribe the time limits for the appeal, the order of proceedings, etc.

In the absence of such regulations the committees may themselves establish their procedure. The proceedings are free from the inflexibility of the Civil Procedure Rules, 1938. In fiscal matters, special rules of procedure have been enacted—*e.g.*, Rules of Court (Income Tax Appeals) 1941.

The rules of evidence also lose their usual inflexibility in the committees. Hearsay, taking evidence without oath, opinions of advisers and reports of experts are admissible although such evidence would not be admissible in a regular court of law.

The majority of the enactments contain provisions establishing the right to appear before the committee and the right to be represented by an attorney, or some other representative.

3. *Powers and remedies*

The scope of the review differs from committee to committee. For example, the powers of the appeal committee under the Emergency Land Requisition (Regulation) Law, 1949, are very broad, for the committee itself must be satisfied that the original order was necessary; this determination is to be made independently and without any reliance on the fact that the competent administrative authority was so satisfied. Similarly, the appeal committees in matters of disability grants and rehabilitation have been given the same powers to re-examine facts as those given to Pension Officers. On the other hand, in income tax cases it has been held that the court should not perform anew the functions of the Assessment Officer and that it only has powers of review (*Att.-Gen.* v. *Leviter*, C.A., 98/56, 11 Piskei Din 1165).

The remedies which the committee is entitled to grant are usually approval of the decision, its reversal or amendment.

The committees are ordinarily vested with the same type of auxiliary powers[3] which may be vested in Commissions of Inquiry under section 5 of the Commissions of Inquiry Ordinance or with expressly enumerated powers similar to those mentioned above.

4. *Grounds for a decision*

There is usually no duty to state the grounds for a decision. Yet the necessity for protecting the individual from unexplained decisions which cut off the opportunity for judicial review has already found some expression in a number of enactments, especially in the laws relating to rehabilitation, disability grants and pensions. Under some enactments a duty to state the reasons for a decision is provided for by the regulations concerning procedure.

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[3] These powers include, for example, the power to compel the appearance of a person as a witness and to require the giving of evidence or the production of documents; the power to exclude the public from its meetings; and the power to award witness fees.

5. *Finality of a decision and the right of appeal*

The absence of uniformity among the various committees is especially evident with respect to the question of the finality of the decision and the right of appeal or the power to review it.

Among the enactments mentioned above, some provide that the decision of the appeal committee may be appealed to the District Court: the Municipal Corporations Ordinance (as regards municipal rates); the Urban Property Tax Ordinance; the Rural Property Tax Ordinance; and the Local Authorities (Business Tax) Ordinance. Under the last three enactments, review in the District Court is by way of an opinion on a point of law. An appeal also lies to the District Court under the Regular Army Service (Pensions) Law, and the Civil Service (Pensions) Law. There are instances where the decision of the appeal committee or of the court may be appealed to the Supreme Court, whether by way of a complete appeal or an appeal on a point of law—*e.g.*, there is a full appeal to the Supreme Court under the Land Betterment Tax Law and an appeal to the Supreme Court on a point of law only under the Invalids (Pensions and Rehabilitation) Law.

A number of laws do not contain any provisions as to the finality of the decision and the right of appeal therefrom—*e.g.*, Ex-Servicemen (Return to Work) Law, 1949; and the Emergency Land Requisition (Regulation) Law, 1950.

In other enactments it has been expressly provided that the tribunal's decision is final—*e.g.*, the Purchase Tax Law, 1952; and the Compulsory Loan Law, 1953, etc.

In an additional group of enactments, the legislator found it necessary to stress the finality of the appeal committee's decision; it was not enough to merely provide that the decision is " final." Thus, for example, it was provided that " no court and no tribunal shall be able to reverse or amend an order given by a competent authority or a decision given by the appeal committee or to postpone their execution." Emergency (Repair of War Damage in Buildings) of 1948.

No automatic right of appeal from the decision of a quasi-judicial committee to the court exists in the absence of a provision granting a right of appeal, even if there is no provision as to finality. On the other hand, even if there exists a provision regarding finality, and *a fortiori* if there is no such provision, there is always a possibility of review by the Supreme Court sitting as a High Court of Justice under section 7 (*b*) (3) of the Courts Law, 1957.[4]

The review exercised by the High Court of Justice is a "forensic" review as distinguished from a complete appeal. It does not go into the substance of the matter. The court does not inquire whether the decision is correct; it only inquires whether the decision is void because of lack of jurisdiction or non-compliance with basic principles of justice or by the reason of collusion or of an error of law apparent on the face of the decision.

B. *Original Administrative Decisions*

Among the original administrative decisions which may not be appealed to quasi-judicial appeal committees, some are subject to review at a higher level of the administrative hierarchy. For example, under the Water Drillings (Control) Law, 1955, at the first administrative level the decision is made by the "Director"; there is a right of objection from the Director's decision to the Minister of Agriculture who constitutes the second level of administrative review. The final administrative decision is subject to the supervision of the High Court of Justice under section 7 (*b*) (2) of the Courts Law, 1957, whether it has been preceded by an internal administrative appeal or not.

The main defect encountered by the courts in the rendering of administrative decisions has been a lack of fair procedure. In cases of licensing (H.C. 113/52 *Lizi Zaks* v. *the Minister of Trade and Industry*, 6 Piskei Din 696), in cases of appropriations (H.C. 5/54, *Ali Yunes* v. *the Minister of Finance*, 8 Piskei Din 314), in cases of dismissals (H.C. 64/49 *Beter* v. *the Prime Minister*, 5 Piskei Din 154), and in other discretionary cases (H.C. 113/53, *Chaya Kaufman* v. *the Minister of the Interior*, 7 Piskei Din 534), the courts complained that the decisions disregarded the elementary principles of natural justice insofar as a hearing had not been given to the wronged party and the grounds for the decisions had not been stated.

The problem of stating the grounds for a decision is now being separately considered in connection with a new Bill for the amendment of the Interpretation Ordinance submitted by Mr. J. Shofman, Member of the Knesset. This amendment was proposed as a result of the judgment of the High Court in H.C. 143/56 *Ahagig* v. *the Transport Inspector*, 11 Piskei Din 370, where Justice Berenson stated: "It would be proper if the respondent stated the reasons with respect to each discretionary decision which can cause a wrong to a citizen."

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[4] Under this law, the High Court of Justice, with certain minor exceptions, is given broad powers to hear any matter "for which it deems justice requires a remedy—provided that the matter is not within the jurisdiction of another court." In such cases, the court is given the power to issue writs of mandamus, prohibition, etc.

The present Bill does not deal with the problem of reasons nor with the question of adopting a uniform procedure before an administrative authority. This subject merits special treatment similar to that adopted in the United States under the Federal Administrative Procedure Act of 1946.

DETAILS OF THE PROPOSED LAW

A. *The Composition of the Administrative Court*

In appeals to the Administrative Court a judge of the District Court will sit alone or with two assessors. These assessors will be selected by the president of the court from a panel of experts and representatives of the public appointed by the Minister of Justice in consultation with the Minister charged with the implementation of the relevant law.

In appeals in which only legal questions arise and in applications for interlocutory orders, intermediate orders, and other provisional questions which are raised in the course of an appeal, the judge may sit without an assessor.

In appeals from decisions involving fiscal matters which are currently heard by the District Court without assessors, decisions will be made in the Administrative Court by a judge sitting without assessors.

B. *Decisions Subject to Appeal*

The jurisdiction of the Administrative Court will consist of appeals from original administrative decisions and not appeals from decisions of appeal committees or tribunals. In other words, the Administrative Court will not be an appeal court from appeal committees; it will replace them. In this aspect the Bill differs from the English Bill of 1955. Under the English Bill, the Administrative Court is a court for hearing appeals from decisions of the tribunals. And the Franks Committee (1957) has recommended that the various tribunals be left alone and that an appeal be allowed from them to appeal tribunals; from these appeal tribunals an appeal will then lie to the court on a point of law (see section 120 of the report). The present Bill follows the recommendations of the Hoover Commission in the United States for the establishment of an Administrative Court which will have direct appellate jurisdiction over administrative decisions and which will replace the various administrative tribunals.

Therefore in all cases in which there is at present an appeal to the appeal committee, and an additional appeal from the committee to the District Court, one level of appeal will disappear. An appeal will be made directly to the Administrative Court. Only where the existing appeal committee is really an administrative authority on a higher level[5]—*e.g.*, the appeal committees which deal with cases involving municipal rates, urban property tax, or rural property tax—will the appeal lie to the Administrative Court, not from the original decision but from the decision of the appeal committee.

In addition to decisions which are already subject to appeal or to objection in a quasi-judicial tribunal, another type of decision which is at present subject only to review by the High Court of Justice will be placed within the jurisdiction of the Administrative Court, *viz.*, decisions relating to licensing. The High Court of Justice has stressed on more than one occasion that decisions relating to licensing, especially to the granting of a licence, the extension or refusal to extend a licence and licence revocation are quasi-judicial decisions. (See H.C. 113/52 *Lizi Zaks* v. *the Minister of Trade and Industry*, 6 Piskei Din 696 at 702.) Since such decisions are quasi-judicial in nature, the proposed arrangement of administrative jurisdiction will be more appropriate for them than the existing system of review by the High Court of Justice.

C. *Powers of Review of the Administrative Court*

The Administrative Court will have the power to consider *de novo* the issues which faced the authority which made the decision. The review will not be limited to an inquiry into the legality of the administrative decision, but may also include an inquiry into the findings of fact. The court may, if it deems fit, put itself into the position of the administrative authority and may make a decision as if the question were brought before it for the first time.

But there is one important limitation on the power of the court: it is not the function of the Administrative Court to consider anew questions of "policy." The policy of the administrative authority is not to be subject to judicial review. This limitation is necessary to prevent "administration by the judiciary."

The provisions of the proposed Bill which list the powers of review are modelled on similar provisions in the Tenant's Protection Law, 1955 (section 37 (*b*)), and the Tenant's Protection Law, 1954 (section 29 as amended in 1956).

The powers of review of the Administrative Court will be similar to those possessed by the Supreme Court in appeals from the decisions of the Registrar of Trademarks. In such cases the court may "replace the discretion of the registrar by its own discretion, although it will not be eager to do so. . . . The registration is subject to the discretion of the registrar; yet even a decision of the registrar which involves an exercise of his discretion is subject to appeal; and if the appellant satisfies the court, and not necessarily on a legal point, that the discretion of the registrar was erroneous, or unjustified on any ground whatsoever, the court will intervene and will not hesitate to allow the appeal " (Justice Olshen in H.C. 150/50, *Kucker & Co.* v. *Registrar General,* 5 Piskei Din 1487 at 1491, cited at H.C. 197/51, *Coca Cola* v. *" Vita " and the Registrar General,* 9 Piskei Din 772 at 776).

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[5] This particular type of appeal committee consists of officials directly connected to the administrative authority which made the original administrative decision. Such a committee is therefore to be distinguished from the independent appeal committee whose members have no direct relationship to the administrative authority over which they exercise a power of review.

D. *Remedies*

The Administrative Court will have the power to affirm the administrative decision, to reverse it, to remand the case to the authority which made the decision or to make any decision deemed necessary which the authority could have made in the same case.

E. *Procedure and Evidence*

The Administrative Court is a court for all purposes and its proper place is within the framework of the District Court. Yet the procedure and especially the rules of evidence in proceedings before this court cannot be as strict as in a civil court. The Administrative Court will therefore have power to admit evidence which would not be admissible in other proceedings. Such provision has been frequently made with respect to appeal committees, and it is also suitable for the Administrative Court.

With the establishment of the Administrative Court, all procedural regulations of existing appeal committees are to be revoked; it will thus be possible to unify the various procedures and to crystallise them in one pattern. The Minister of Justice will be empowered to make regulations on any matter relating to the implementation of the proposed law, including regulations as to the modes of filing the appeal, the time limits for filing and the procedure in dealing therewith.

F. *Appeal from the Decisions of the Administrative Court*

Under the proposed provisions, a decision of the Administrative Court will be subject to appeal to the Supreme Court in the same manner as all other judgments of the District Court. The appeal will lie as of right and not by leave. This provision will solve the problem of " finality " which has troubled courts which have been called upon to review decisions of the various appeal committees.

The tendency to grant a right of appeal to the Supreme Court from administrative decisions has already appeared in a number of enactments. Thus, a full right of appeal was provided for in the Estate

Tax Law, 1949, and an appeal on a point of law only in the Invalids (Pensions and Rehabilitation) Law, 1949 (as amended in 1955).

Any administrative decision which is not subject to appeal to the Administrative Court—*i.e.*, which is beyond the scope of the proposed law—will remain subject to review by the High Court of Justice.

G. *The Schedule*

The leading principle in drafting this Bill has been the distinction between administrative decisions in which there is a quasi-judicial element and decisions which lack this element. The first group will be subject to appeal to the Administrative Court; the latter will remain under the supervision of the High Court of Justice.

In view of the great difficulty of making the above distinction by general definitions and provisions, the Bill has utilised the method of enumeration. The decisions which will fall within the special jurisdiction of the Administrative Court are enumerated and explained in the Schedule. This Schedule will remain flexible and will be subject to amendment as provided in section 9 of the Bill.

The Schedule contains decisions which are at present subject to objections or appeal before statutory bodies and decisions relating to licensing under nineteen listed enactments.

The Schedule does not list decisions of disciplinary tribunals, *e.g.*, the decisions of the Law Council or the Auditors' Councils, because such decisions are administrative in the strict sense; the review of these decisions will remain vested in the High Court of Justice. The Schedule does not contain administrative decisions the review of which is satisfactory and which result from special arrangements, for instance, decisions under the National Insurance Law, 1954. Nor does the Schedule contain administrative decisions made under emergency regulations.

AN EXPERIMENT IN UNICAMERALISM

J. F. NORTHEY

SINCE 1950, when the upper house—the Legislative Council—was abolished, New Zealand has had a unicameral legislature. It is probably too soon to say whether this will be a permanent feature of the constitution or whether a differently constituted second chamber will be established in the future. The Labour Party, now the Government, is understood to be opposed to a second chamber, but the National Party, which was defeated at the 1957 General Elections, included a brief statement in its manifesto showing that the question of bicameralism has not yet ceased to be a political issue.

This is an appropriate time to re-examine [1] the merits and demerits of bicameralism. The reform of the House of Lords is again the subject of discussion.[2] The re-establishment of a second chamber in Queensland may well become part of the programme of the present Government, the leader of which while in opposition expressed himself as dissatisfied with a unicameral legislature.[3] In New Zealand, a small group of convinced bicameralists, including some former Legislative Councillors, with the support of at least some members of the Opposition, may be able to exert sufficient influence to make the creation of a second chamber an issue at a future election.[4]

THE LEGISLATIVE COUNCIL

New Zealand's Legislative Council had an interesting history. There were periods when it was in violent opposition to the House of Representatives, but its last twenty years saw a decline in its

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[1] Probably the best known books dealing with bicameralism are J. A. R. Marriott, *Second Chambers* (1927), H. B. Lees-Smith, *Second Chambers in Theory and Practice* (1923), C. F. Strong, *Modern Political Constitutions* (1950), and M. H. V. Temperley, *Senates and Upper Chambers* (1910). See also D. J. Riddiford's articles in (1950) 26 *N.Z.L.J.*, 313, 329 and (1951) *N.Z.L.J.*, 102 on the New Zealand Legislative Council.

[2] On this occasion, it is mainly the question of membership, which has resulted in the Life Peerages Act, 1958. Earlier inquiries, *e.g.*, the Bryce Conference of 1917–18 (whose report is published as Cmd. 9038, 1918) had much wider terms of reference. Discussions between party leaders took place in 1948 (the agreed statement was published as Cmd. 7380, 1948) prior to the Parliament Act, 1949, which further restricted the powers of the House of Lords.

[3] Mr. G. F. R. Nicklin's views were set out in a memorandum dated 6 May, 1948, sent to the New Zealand Joint Constitutional Reform Committee.

[4] This is extremely doubtful; experience has shown that there is little popular interest in constitutional issues of this kind.

powers and in the quality of its members. The Council was established in 1852 when life appointments were made to it by the Crown.[5] The term of office was reduced to seven years in 1891.[6] Legislation providing for the election [7] of members of the Council was passed in 1914, but the Proclamation required to bring the Act into operation was never issued.[8] In 1947, the Leader of the Opposition introduced a Bill for the abolition of the Council.[9] The Bill was defeated,[10] but an extremely valuable by-product was the adoption of the Statute of Westminster 1931 and the passage of other legislation of vital constitutional importance. The National Party made abolition of the Legislative Council " as at present constituted " part of its election platform at the General Elections of 1949 and, on becoming the Government, fulfilled its pledge by securing the enactment of the Legislative Council Abolition Act, 1950.[11] To assure its passage, the Council was " swamped " [12] by the appointment of twenty-seven new councillors none of whom voted against its abolition.[13]

There was ample justification for the abolition of the Council. Whether the explanation for its declining influence lay in the poorer quality of the appointees [14] or in the insecurity of their tenure as compared with those appointed for life prior to 1891 or in some other direction, by 1950 it had been reduced to a mere rubber stamp for Bills passed by the lower house.[15] It could not claim to be a revising chamber or even a chamber where non-controversial Bills were introduced. After the Act to abolish the Council was passed, a Committee of the House of Representatives was appointed to consider the establishment of an alternative chamber.[16]

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[5] New Zealand Constitution Act, 1852, ss. 32, 33, 34. No limit was placed on the number of Legislative councillors who might be appointed.

[6] Legislative Council Act, 1891, s. 3. This Act marked the end of the independence of the council. Those who wished to secure reappointment would be unlikely to oppose the Government of the day.

[7] In 1852, it was proposed that the council be elected; Appendix to the Journals of the House of Representatives (henceforth App. H.R.) 1883, A–3A.

[8] The Government suffered a change of heart; the Act was repealed when the Council was abolished in 1950. Reference should be made to App. L.C. 1913, No. 1, for the Report of the Select Committee which preceded the enactment of the 1914 Act. That Act effectively ended attempts at reform of the Council.

[9] Dissatisfaction with the Council was hardly a novelty. Between 1865 and 1914 thirty-three Bills providing for its abolition had been introduced. Some of the Council's history is contained in the Appendix to the Journals of the Legislative Council (henceforth App. L.C.) 1885, No. 1 and App. L.C. 1913, No. 1.

[10] The Government pointed out that it was doubtful whether the General Assembly possessed the power to pass the legislation. The Statute of Westminster Adoption Act, 1947, the New Zealand Constitution Amendment (Request and Consent) Act, 1947 and the New Zealand Constitution Amendment Act, 1947 (U.K.) resolved these doubts and removed all restrictions on legislative competence.

[11] A curious reversal of the traditional rules of the two parties had taken place. Labour, while in opposition, had advocated abolition but in office had found, as its predecessors had done, that the Council could be used to reward its supporters. The National Party was manoeuvred into sponsoring a measure which must have been anathema to many of its supporters.

[12] Membership was increased to 50; the average membership had been 35–40; it rose as high as 53 in 1885–1886.

[13] Thus giving support to the belief that their appointments were made on the understanding that they would vote themselves out of office.

[14] One critic of the Council said that he failed to see that the qualifications for appointment to the Council were necessarily possessed by those who possessed sheep; W. A. Murray, *N.Z.P.D.* Vol. XVI, p. 973.

New Zealand now stands alone among Commonwealth countries in possessing a unicameral legislature.[17] After the abolition of the Legislative Council, the Standing Orders of the House of Representatives were amended so as to impose delays between the first, second and third readings of Bills,[18] but the delays are nominal. However, it cannot be asserted that the quality of legislation has deteriorated since the Council was abolished.[19] There has been no case of "hasty, ill-considered" legislation in that period. That does not, of course, answer the case of the bicameralists because functions other than revision have been traditionally assigned to second chambers.[20] But before discussing that question, there is a preliminary, but controversial, point calling for brief mention. Can a sovereign legislature, such as the New Zealand General Assembly, bind its successors? Can the General Assembly, if it created a second chamber, so "entrench" it that the upper house could not be abolished or have its powers whittled away by a statute passed in the ordinary way? The Joint Constitutional Reform Committee believed that entrenchment, in the sense of prescribing a special procedure for the amendment or repeal of certain legislation was not possible in New Zealand.[21] There is a difference of opinion on this question,[22] and it is by no means clear that the view of the Committee would be adopted by the New Zealand courts.

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[15] In the period 1897–1914, the House of Representatives had passed some 130 Bills introduced in the Council. Between 1915 and 1931, the figure was 60, but from 1931 to its abolition no Bill introduced in the Council had become law. Formerly, it had asserted its independence; in the period 1872–1900 some 200 Bills passed by the Houe of Representatives had been rejected by the Council; about 40 were rejected between 1901 and 1932, but none had been rejected between 1933 and 1950.

[16] Members of the Legislative Council were appointed to the Committee which was known as the Joint Constitutional Reform Committee. Its report is contained in App. H.R. 1952 1–18. An earlier Committee appointed in 1947 had been unable to reach agreement.

[17] The legislature of Queensland and the provincial legislatures of Canada (except Quebec) are unicameral, but their powers are more limited than those of the New Zealand General Assembly.

[18] S.O. (1951) Nos. 213, 235 and 238.

[19] On only a few occasions has it been necessary to amend an Act passed earlier in the same session. It has not been necessary for the Government to advise the Governor-General to use his powers under the Constitution Act, 1852, s. 56, to recommend amendments to Bills which have passed their third readings.

[20] See below, p. 268.

[21] App. H.R. 1952, 1–18, 39–45. The Committee spoke (p. 42) of the futility of so providing but nevertheless recommended that it be done; *ibid.*, p. 45. See also the Electoral Act, 1956, s. 189, where a special procedure for the amendment of certain sections is provided. Strangely enough, s. 189 is not itself "entrenched."

THE FUNCTIONS OF A SECOND CHAMBER

Those who have offered opinions on the functions that might be performed by a second chamber (other than one which is directly elected) seem to be in agreement that the lower house must be the more powerful.[23] But the acceptance of this principle leaves scope for a useful second chamber. The Report of the Bryce Conference is frequently cited as an authoritative statement of the functions appropriate to a second chamber. That Committee assigned to the House of Lords [24]:

> (1) The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions, during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.[25]
>
> (2) The initiation of Bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into well-considered shape before being submitted to it.[26]
>
> (3) The interposition of so much delay [27] (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new

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[22] The most recent contribution to the controversy was made by Sir Owen Dixon, the Chief Justice of the High Court of Australia, 31 *Aust. L.J.* (1957), 240. The more important articles are mentioned in footnote 19 of that article.

[23] *e.g.*, Report of the Bryce Conference, Cmd. 9038, 1918, para. 8; Report of the Joint Constitutional Reform Committee, App. H.R. 1952, 1–18, 31–33.

[24] Cmd. 9038, 1918, para. 6.

[25] Whether the revising function will be satisfactorily performed depends upon the qualifications of the members of the upper house; see below, p. 270. The reason assigned by the Conference, limited debate in the House of Commons, is not of general application; it has less application to New Zealand where the lower house consists of only 80 members.

[26] Because legislation can be initiated in either house legislation should be passed more quickly; this view was expressed by Mr. Herbert Morrison, M.P., in a speech to the Labour Party Conference of 1948 as reported in the *Manchester Guardian* of May 22, 1948.

[27] The Conference of Party Leaders (Cmd. 7380, 1948) broke down on the question of how long a Bill could be delayed. The Parliament Act, 1949, reduced the period of delay from two years to one year. The Joint Constitutional Reform Committee recommended a delay of two months; App. H.R. 1952, 1–18, 33, 46–47. A longer period would be preferable; under the Danish Constitution of 1953, by which a unicameral legislature was established, two-fifths of the members of the Folketing can require that the third reading be delayed twelve weeks from the conclusion of the second reading.

> principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided. (4) Full and free discussion of large and important questions, such as foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an Assembly whose debates and divisions do not involve the fate of the Executive Government.[28]

Other functions that have been suggested include the initiation of consolidation measures,[29] the examination of statutory rules and orders,[30] opposing measures for which the government have no mandate,[31] assuring the independence of the Auditor-General, Judges and senior public servants,[32] the speeding up of legislation,[33] securing the views of those specially qualified,[34] the conduct of commissions of inquiry,[35] and representation of racial or minority groups.[36]

The New Zealand Joint Constitutional Reform Committee recommended that the second chamber should:

> (1) Take over the duties of the Statutes Revision Committee[37];
> (2) examine all subordinate legislation[38];

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[28] The contribution made by the upper house will be governed by the qualifications of its members. On this point, see Report of the Bryce Conference, Cmd. 9038, 1918, para. 7; Report of the Soulbury Commission on the Ceylon Constitution, Cmd. 6677, 1945, paras. 4 and 20.

[29] Report of the Commission on the Irish Senate, 1936, para. 1 (d). This probably falls under the second recommendation of the Bryce Conference.

[30] *Ibid.*, para. 1 (e); Report of the Joint Constitutional Reform Committee, App. H.R. 1952, 1–18, 35.

[31] Memo. from Mr. Nicklin (see above, footnote 3). This is probably covered by the third recommendation of the Bryce Conference. The notion of mandate it quite unsatisfactory. Political platforms today contain so many planks. In addition, there is the question of who shall determine whether the government has a mandate.

[32] Memo. from Mr. Nicklin (see above, footnote 3). There is substance in this criticism of unicameralism, especially so far as judges are concerned. They are removable in the United Kingdom on a joint address. A unicameral legislature places the tenure of judges in the hands of the government. The Controller and Auditor-General is removable upon an address from the House of Representatives; Public Revenues Act, 1953, s. 4. Most other public servants are removable in New Zealand by the Public Service Commission (itself removable by the Governor-General on the advice of the government) so that the possibility of government pressure exists; Public Service Act, 1912, ss. 10 and 51.

[33] See above, footnote 26.

[34] See above, footnote 28.

[35] Provided suitable persons are present in the upper house. It might also conduct investigations comparable to those undertaken by committees of the United States Senate.

[36] Report of the Soulbury Commission, Cmd. 6677, 1945, paras. 1, 16, 17. In New Zealand, Maoris have special representation in the House of Representatives.

[37] This Committee examines any Bill of a legal character in order to ensure that it achieves its purpose. Members with legal qualifications are invariably appointed to this Committee.

[38] Something akin to the work of the United Kingdom Scrutiny Committee was envisaged.

(3) consider all petitions to Parliament;
(4) take over the duties of the Local Bills Committee[39];
(5) have the power of amendment, but no veto, in respect of Bills sent up by the House of Representatives[40];
(6) have the power to initiate legislation.

It was proposed that the House of Representatives should have the right to appoint some of its members to the Committees of the upper house which would perform the first four tasks already mentioned.

It is conceded that the major function of a second chamber is to check " hasty " or " ill-advised " legislation, especially that of a constitutional nature. But in the United Kingdom and under the New Zealand Committee's recommendations, this amounts to no more than acting as a revisory body whose amendments can be disregarded once a certain period of time has elapsed. It should perhaps be stated that it is somewhat illogical to confine the powers of the second chamber to statutes and to leave subordinate legislation free from this form of control. It can no longer be asserted that such legislation is confined to matters of detail.

However, even if it is granted that there are certain functions that can usefully be performed by a second chamber, it remains necessary to consider the attitude of the electorate. In New Zealand and elsewhere, there is little popular interest in constitutional reform. But, when the Joint Constitutional Reform Committee invited submissions, it was found that none of those who responded favoured unicameralism and that most newspaper editorials expressed the hope that the committee would be able to recommend an acceptable second chamber.[41] It can thus be said that informed opinion in New Zealand favours bicameralism.

THE COMPOSITION OF A SECOND CHAMBER

A consideration of bicameralism would be incomplete if it omitted reference to the methods that have been suggested for constituting a second chamber. Though there tends to be agreement on the desirability of an upper house, agreement disappears when its composition is discussed. The problem has been posed in these words:

> . . . to devise a good second chamber; to discover for it a basis which shall be at once intelligible and differentiating; to

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[39] This Committee examines all local Bills after the second reading.

[40] A power to delay for not more than two months was recommended.

[41] Expense hardly enters into the question. It was estimated in 1948 that the honoraria and administrative expenses of the Legislative Council did not exceed £32,000 p.a.

> give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform—this is a task that has tried the ingenuity of constitution-makers from time immemorial.[42]

There are, it seems, three bases for membership of a second chamber[43]:

(1) the hereditary principle[44];
(2) nomination[45]; and
(3) election, direct or indirect.[46]

The hereditary principle need not be discussed; even in the United Kingdom, where it is acknowledged that the House of Lords has in general performed its functions with marked success, we may soon see the House constituted on a different principle. Nomination by the government alone has been a failure in New Zealand and Canada. Government supporters tend to be appointed; because few of those appointed possess the qualifications necessary for the proper performance of the functions of an upper house, it fails to make any worthwhile contribution to legislation or discussion and falls into contempt. However, this is not a necessary consequence of the nominative principle. The shortcomings of nominated houses could perhaps be avoided if the power of nomination were shared between the government and the opposition parties in proportion to their strengths in the lower house.[47] Not only would this proposal secure the services of many to whom the hurly-burly of elections has no appeal,[48] but there would also be a tendency for each party to ensure that its representatives in the upper house were of the highest quality available.[49] An upper house so constituted would, it is suggested, be able to perform the functions already discussed.

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[42] J. A. R. Marriott, *Second Chambers* (1927), 238. See also Bryce Report, paras. 1, 9–27.

[43] Combinations of these methods are possible; see Bryce Report, paras. 25–27. A "functional" chamber could be constituted by use of the second or third methods.

[44] There is dissatisfaction in the United Kingdom with this principle; it would not be acceptable in New Zealand.

[45] New Zealand Legislative Councillors were appointed by the Governor-General on the advice of the Prime Minister. The Canadian and Quebec Senates are nominated bodies.

[46] The Australian Senate is directly elected for six years as are the Legislative Councils of South Australia, Tasmania, Victoria and Western Australia (the franchise is limited in the case of some of these Councils); the Legislative Council of New South Wales is indirectly elected by the Council and the Legislative Assembly.

[47] This was recommended by the Joint Constitutional Reform Committee; App. H.R. 1952, 1–18, 29–31. The inspiration for the recommendation may have been the reform proposals of Lord Lansdowne who in 1911 suggested that 100 of the 320 members of the House of Lords should be appointed in this way.

[48] This factor has frequently been emphasised: see, *e.g.*, Bryce Report, para, 7 (2) and App. H.R. 1952, 1–18, 27.

Election, direct or indirect, will not necessarily achieve this; it has the added disadvantage of making the upper house too powerful, especially if it is directly elected. It could then claim to be as accurate a judge of popular wishes as the lower house.[50] Indirect election poses the question of who shall constitute the electorate.[51] The proposal made in 1939 for the reform of the Danish upper house seemed an excellent compromise, but it was rejected.[52]

A functional house, that is one representative of various sections of the community, could be secured either by nomination or indirect election. Each method has certain difficulties.[53]

Another problem is the term for which members of the upper house should be appointed. Life tenure or even a term beyond that of the lower house is unsatisfactory because the upper house might easily have a majority of members opposed to the government.[54] This would almost invariably happen on a change of government. Where the number of members of the upper house is fixed by statute, thus making it impossible for the government to " swamp " it so as to secure a favourable majority, the terms of members should correspond with that of the lower house.[55]

It is no longer correct to assert[56] that no free country enjoying democratic institutions has adopted a single chamber government. But bicameralism is traditional within the Commonwealth and has a substantial body of informed opinion to support it in New Zealand.

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[49] App. H.R. 1952, 1–18, 30–31.

[50] Elected houses, *e.g.*, the Australian and United States Senates have demonstrated their independence. This commonly occurs when the party with a majority in the lower house does not control the upper house.

[51] Unless the lower house constituted the electorate, there might be sharp political disagreement on this point. For example, if the electorate were members of local authorities, the New Zealand Labour Party could hardly be expected to accept such a scheme.

[52] Under the proposal, a parliament of 200 members was to be elected, partly by constituencies and partly from national lists which would include the names of many who would not take part in a political campaign. Those elected from the national lists plus an equal number of members elected by constituencies would form the upper house. It was thought that many distinguished persons who would not otherwise enter parliament might be persuaded to include their names on a national list. See above, footnote 48.

[53] They were discussed by the Joint Constitutional Reform Committee; App. H.R. 1952, 1–18, 26.

[54] H. B. Lees-Smith, *Second Chambers in Theory and Practice* (1923), 248, accepts the principle that an upper house should reflect the strength of the parties in the lower house. See also App. H.R. 152, 1–18, 27, 29.

[55] App. H.R. 1952, 1–18, 20–24. *Cf.* Bryce Report, paras. 28–30, in which a term of 12 years was suggested.

[56] As did Sir Winston Churchill, *Hansard*, Vol. 444, No. 16, November 11, 1947, col. 209. The statement was then incorrect. Unicameralism has been adopted, apart from New Zealand, in Finland (1906), Queensland (1922), Turkey (1924), Denmark (1953) and in a number of European, Middle East and South American states, but some of these might not qualify as democratic countries.

However, before a second chamber can be re-established in New Zealand, both political parties must be prepared to support its reintroduction. To secure its creation, the government must sponsor the necessary legislation; for the upper house to survive a change of government, it must also be supported by the opposition.[57]

Perhaps the neatest attack on bicameralism is contained in the epigram of the Abbé Sieyès[58]:

> If a second chamber dissents from the first it is mischievous; if it agrees it is superfluous.

Put in another way: if a second chamber resists the government, it will be abused; if it never resists it, it will be said to be useless. Of course, the Abbé did not pose a true dilemma because a second chamber need not be given a power of veto. The functions discussed[59] do not give to the upper house a power to dissent, but only the right to interpose a certain delay before the Bill becomes law.

Serious consideration must be given to Marriott's opinion[60]:

> If the civilised world has decided with unanimity that the safeguarding even of a Constitution technically rigid shall not be entrusted to a single Legislative Chamber, can it conceivably be the part of statesmanship to confide to a single chamber a constitution which is at once the most delicately equipoised and the most easily altered in the world ?

Marriott was speaking of the Constitution of the United Kingdom, but his remarks have equal application to New Zealand. An advisory committee, sometimes suggested as capable of performing the functions of a second chamber, could not prevent the subversion of the constitution. To protect the constitution and halt the passage of misconceived legislation, a second chamber not completely dependent on the Government of the day is thought to be a more satisfactory solution[61] than an attempt to limit the powers of a single chamber by requiring referenda or specified majorities in certain cases.

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[57] But if the legislation was "entrenched" (see above, footnote 22), it might survive a change of government.

[58] *Cf.* J. H. Clapham, *The Abbé Sieyès* (1912), 128–131.

[59] See above, p. 268.

[60] J. A. R. Marriott, *Second Chambers* (1927), 231. A similar opinion is expressed by W. E. H. Lecky, *Democracy and Liberty* (1896), Vol. I, 363.

[61] The problem of what powers of resistance the upper house is to possess remains. If it merely has a power to delay, the constitution is not fully protected. But if it had the power to require a referendum, the responsibility for rejecting the legislation would be placed in the hands of the electorate. In Denmark, under the constitution of 1953, one-third of the members of the Folketing can demand a referendum. A unicameralist might assert with some justification that this is the only protection that is needed and that an upper house is superfluous. But this assertion ignores the other functions performed by a second chamber and the restraint imposed by the mere existence of an upper house.

CONCLUSION

Most thoughtful people appear to accept the principle of a second chamber, but they would probably disagree on its composition and term of office. Possibly, there is no perfect solution; many second chambers that are elected have been successful; the hereditary principle has worked reasonably well in the United Kingdom; some nominated houses have functioned efficiently at certain periods. It is for each country to decide what method suits its needs and circumstances. The proposals of the New Zealand Joint Constitutional Reform Committee have much to commend them, but the National Party, which was responsible for its appointment and which had five years to consider its recommendations, did not introduce the necessary legislation or make any serious attempt to test the opinion of the electorate. The Committee's proposals presumably did not pass the essential test of acceptability to the Government of the day. As there appears at present to be little popular demand for a second chamber it is unlikely that the Labour Government will take up the question. Thus in New Zealand we shall probably continue to be governed by a unicameral legislature until some crisis occurs that causes us to regard our legislature as unsatisfactory. But then, if Lecky's prophecy is fulfilled, it may be too late

> to avert the evils that must, sooner or later, follow from the unbridled power of a purely democratic House of [Representatives].[62]

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[62] *Democracy and Liberty* (New York, 1896), Vol. I, 364.

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This digest, which has been compiled by the Editor, covers the period from April 1, 1958, to June 30, 1958.

UNITED KINGDOM

COMPULSORY PURCHASE

Compensation

The Minister of Housing and Local Government stated on June 20, 1958, that the Government were carrying out a general re-examination of the basis of compensation for the compulsory acquisition of land (589 H.C. Deb. *107*).

COURTS

County Courts

Account has been published of the transactions of the Accountant-General of the Supreme Court under the County Court Fund Rules for 1956; also of the National Debt Commissioners; together with the report of the Comptroller and Auditor General thereon (H.C. 161 of 1957–58).

Criminal Appeals

House of Lords. The Solicitor-General stated that since January 1, 1949, 976 applications for leave to appeal to the House of Lords had been received. Twenty-one certificates had been granted since the Criminal Appeal Act, 1907, came into force, 5 at the instance of the prosecution and 16 at the instance of the defence; 7 appeals had been allowed and 14 dismissed (585 H.C. Deb. *117*, April 1, 1958).

Criminal Courts

Interdepartmental. The Secretary of State for the Home Department gave the names of the committee appointed under the chairmanship of Mr. Justice Streatfeild on the business of the criminal courts (589 H.C. Deb. *100*, June 19, 1958).

Judicial Committee of the Privy Council

Jurisdiction. An appeal to the Supreme Court of Ceylon under section 15 of the Indian and Pakistani Residents (Citizenship) Act, 1949, from an order of the commissioner refusing or allowing an application for registration as a citizen of Ceylon is a " civil suit or action in the Supreme Court " within the meaning of section 3 of the Appeals (Privy Council) Ordinance of Ceylon (c. 85 of the Legislative Enactments, 1938), which provides for appeals to the Privy Council by parties " to civil suits or actions in the Supreme Court," and accordingly an appeal from the Supreme Court's decision on appeal from the commissioner lay to the Privy Council in the discretion of the Supreme Court under rule 1 (*b*) in the Schedule to the Appeals (Privy Council) Ordinance where that court were of opinion that the question involved was " one which by reason of its great general or public importance" ought to be submitted to the Board: TENNEKOON *v.* DURAISAMY [1958] 2 W.L.R. 994, J.C.

Law Reform, Scotland

Maintenance orders. The 5th Report of the Law Reform Committee for Scotland (Chairman: Honourable Lord Walker) has been published. It concerns the need for provision allowing the enforcement in Scotland of orders for maintenance made by the courts of other Commonwealth countries (except England and Wales) and, reciprocally, the enforcement in those other countries of orders for aliment made by Scottish courts (Cmnd. 449).

Legal Aid

Account has been published of the receipts and expenses of The Law Society paid into and out of the Legal Aid Fund; also that for Scotland; together with the reports of the Comptroller and Auditor General thereon (H.C. 158 and 196 of 1957–58).

Advice. The Lord Chancellor stated on June 12, 1958, that section 7 of the Legal Aid and Advice Act, 1949, and its Scottish equivalent, would be brought into force towards the end of the present financial year, in accordance with proposals, prepared by The Law Society, providing for the giving of oral advice by solicitors in ordinary practice for a fee paid out of the Legal Aid Fund. It was hoped to bring section 5 into force later in the next financial year (209 H.L. Deb. 792; see also 589 H.C. Deb. 898; 590 H.C. Deb. 213).

Judicial observations. On April 22, 1958, the Lord Chancellor replied to a question concerning observations made by Roxburgh J. in the Chancery Division in a case where a legally aided plaintiff had fabricated evidence (208 H.L. Deb. 845–850).

Seventh Report of The Law Society has been published with comments and recommendations made by the Advisory Committee (Chairman: Viscount Bridgeman) (H.M.S.O. 39–72–7).

Statistics

Civil judicial statistics for England and Wales have been published relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, County Courts and other Civil Courts for 1957 (Cmnd. 434).

Supreme Court of Judicature

Account has been published of receipts and expenditure of the Accountant-General for 1956–57; also statement of liability of the Consolidated Fund; also account of the National Debt Commissioners; together with the report of the Comptroller and Auditor General thereon (H.C. 146 of 1957–58).

Rules have been made concerning procedure. Rule 1 adds London County 6 per cent. stock, 1975–78, to the list of securities in which money in court may be invested; Rule 2 clarifies certain provisions in the Rules of the Supreme Court relating to appeals from a judge in chambers; Rule 3 deals with the time for setting down an appeal from a county court to the Court of Appeal; and Rule 4 makes certain changes in the fixed costs recoverable under section 47 (4) of the County Courts Act, 1934, consequential on the Supreme Court Fees (Amendment) Order, 1958. (S.I. 1958 No. 650.)

Criminal Appeal Rules have also been made. Paragraph (*d*) of Rule 5 of the Criminal Appeal Rules, 1908, makes provision as regards the furnishing by a shorthand writer appointed under the Criminal Appeal Act, 1907, of a transcript of the shorthand note of a criminal trial or other proceeding in relation to which a person may appeal under the Act, The paragraph provides that the shorthand writer shall, on payment of the appropriate charges, furnish a transcript of the whole or any part of the shorthand note to a party interested in the trial or other proceeding, and to no other person. The present Rules relax the total prohibition imported by the words " and to no other person "; the paragraph, in its new form, will enable the shorthand writer, on leave being given by a judge of the Court of Criminal Appeal, to furnish a transcript to a person who is not entitled to one as of right. (S.I. 1958 No. 652.)

CRIMINAL LAW

Statistics

The Criminal Statistics for Scotland for 1957 have been published (Cmnd. 426).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Civil Service

Staffs employed. A statement has been issued showing the numbers of the Civil Staffs employed in Government Departments on April 1, 1958, as compared with April 1, 1957. It shows a total of 630,674 (including 253,103 Post Office staffs) on the later date which is a decrease of 4,982 (Cmnd. 442; for previous statement, see [1957] P.L. 253).

Downing Street

Report of the Committee on the preservation of Nos. 10, 11 and 12 Downing Street has been published (Cmnd. 457; see also 589 H.C. Deb. 1317–1318 and 209 H.L. Deb. 1137–1138, June 19, 1958).

Inspectorate

Fire. The Report of H.M. Inspector of Fire Services for Scotland for 1957 has been published (Cmnd. 425).

Police. The 95th Report of H.M. Inspector of Constabulary for Scotland for 1957 (Cmnd. 437) and the Report of H.M. Inspectors of Constabulary for the counties and boroughs in England and Wales for 1956–57 (H.C. 218 of 1957–58) have been published.

Ministers' Functions

Agriculture. The Report of the Department of Agriculture for Scotland for 1957 has been published (Cmnd. 392).

Education. The Report of the Secretary of State for Scotland for 1957 has been published (Cmnd. 407).

The Report of the Ministry of Education for 1957 and the statistics of public education for England and Wales have been published (Cmnd. 454).

Health. The Report of the Department of Health for Scotland for 1957 has been published (Cmnd. 385).

Housing and Local Government. The Report of the Ministry for 1957 has been published (Cmnd. 419).

Police. On June 16, 1958, the House of Commons debated a motion: that the Carmarthenshire and Cardiganshire Police (Amalgamation) Scheme, 1958, a Draft of which was laid before this House on April 24, be not made. The motion was defeated (589 H.C. Deb. 829–856).

Research

Agriculture. The account of the receipts into and issues out of the Agricultural Research Fund in 1956–57, together with the Report of the Comptroller and Auditor General thereon, has been published (H.C. 130 of 1957–58).

The Report of the Agricultural Research Council for 1956–57 has been published (Cmnd. 432).

Department of Scientific and Industrial Research. The Report of the Research Council for 1956–56 has been published (Cmnd. 428). This is the first Report of the Council established under the D.S.I.R. Act, 1956, to replace the earlier advisory Council (see also [1957] P.L. 59; [1956] P.L. 373).

HOUSING

Local authority building

On May 1, 1958, the House of Commons in Committee of Supply debated the building of council houses (587 H.C. Deb. 585–654).

Rents

N. was a tenant of a house owned by a local authority. The local authority operated a differential rent scheme, the purpose of which was to subsidise such tenants as could not afford to pay an economic rent. The scheme provided that the subsidised tenant should notify the local authority of any change of income. During the year 1955–56 N. received the maximum subsidy of 12s. a week. Subsequently the local authority discovered that during the year 1955–56 N. had been in receipt of overtime and that he should have received a subsidy of only 2s. a week. Accordingly for the following year N.'s rent card was made out at the proper rent, to which was added a weekly sum of 10s., which the local authority alleged was due to them on account of the alleged under-payments of rent during the previous year. In October, 1956, N. determined the tenancy. The local authority sought to recover the alleged underpayments for the remainder of the year. *Held,* that such alleged underpayments were irrecoverable.

Per Lord Evershed M.R.: " The true short and clear answer to the local authority's claim is that there were no arrears at the relevant date, and are not now any arrears of rent ": HAVANT AND WATERLOO URBAN DISTRICT COUNCIL *v.* NORUM [1958] 1 W.L.R. 721; [1958] 2 All E.R. 423, C.A.

C. was the tenant of a council house. Rent was due on Mondays and the agreement provided that " the tenancy may be terminated . . . by the giving of one week's notice before 12 noon on any Monday." In August, 1956, the council sent C. a circular letter stating that they had decided to operate a differential rent scheme and purporting to raise C.'s rent; C., however, refused to pay any increase. On June 14, 1957, the council served on C. a notice " to quit and deliver up the premises . . . by noon on Monday, July 1, 1957." In an action for possession, arrears of rent (represented by the purported increase) and mesne profits. *Held* (1) that section 85 (6) of the Housing Act, 1936, did not give the council the power to override the tenancy agreement: if they sought to increase the rent, they must first determine the contractual tenancy; (2) that the notice of June 14, 1957, was bad as a notice to quit because it did not expire at the same time as the tenancy: the notice expired at noon on July 1, 1957, the current period of the tenancy twelve hours earlier: BATHAVON R. D. C. *v.* CARLILE [1958] 2 W.L.R. 545; [1958] 1 All E.R. 801, C.A.

INQUIRIES

Transport

Air. The Report has been published of the court investigation of the accident on March 14, 1957, to Viscount G-ALWE which occurred at Ringway Airport. The Report is dated February 26, 1958 (C.A.P. 147).

Railway. The Reports have been published (a) of the collision on December 7, 1957, at Milngavie Junction (March 18, 1958); (b) of the collision on

January 22, 1958, at Hooton South Junction (March 20, 1958); (c) of the accident on November 6, 1957, near Stallingborough (April 14, 1958).

LOCAL GOVERNMENT

Children

Particulars of the number of children in care of local authorities in England and Wales in March 1957, the manner of their accommodation and the estimated costs of maintenance have been published (Cmnd. 411).

Contracts

The Lord Chancellor has referred to the Law Reform Committee the question whether, having regard in particular to the decision in *Wright (A. R.) & Son* v. *Romford Borough Council* [1956] 3 W.L.R. 896, alterations are desirable in the law concerning formalities required for contracts made by or notices given by corporations not being companies within the meaning of the Companies Act, 1948.

Delegation

By section 59 of the London Government Act, 1939, a local authority may appoint a committee for any purpose which in the opinion of the authority would be better managed by a committee and by section 67 the local authority may delegate to the committee any functions relating to a matter referred to it. A local authority appointed a works committee and by its standing orders it was provided: "The works committee shall be responsible for . . . appointment and management of staff of borough engineer's department." The plaintiff, having applied for the post of assistant road superintendent, was interviewed by the works committee, which resolved that the plaintiff be appointed to the post. He was notified by the town clerk that he had been selected "subject to confirmation." Subsequently the committee appointed someone else. The plaintiff brought an action for breach of contract. *Held,* that on the true construction of the standing orders the local authority had delegated to the works committee the power to appoint the plaintiff to the post and the committee having entered into a contract to that end were in breach: BATTELLEY *v.* FINSBURY BOROUGH COUNCIL (1958) 122 J.P. 169; 56 L.G.R. 165, Salmon J.

Finance

Rating and valuation. The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *Guinness Trust (London Fund) Founded 1890 Registered 1902* v. *West Ham Borough Council* [1958] 1 W.L.R. 541; [1958] 2 All E.R. 237 D.C.; *Trustees of West London Mission of the Methodist Church* v. *Holborn Metropolitan B. C.* (1958) 51 R. & I.T. 297; *Oxford Union Society* v. *City of Oxford* (1957) 2 R.R.C. 54.

Local Government Bill

The Ministry of Housing and Local Government has issued Circular No. 34/58, dated May 29, 1958, dealing with the preparations necessary for the making of the first general grant order under the Local Government Bill. Local authorities are required to make an assessment of the current level of expenditure by them on the services to be covered by the general grant and to estimate the need for further developing these services in the period of two years to be covered by the first general grant order. Local authority officers are requested to complete and send the returns which their local authorities have settled by August 15, 1958, at the latest.

Private Bill Legislation

On May 13, 1958, the Chairman of Committees in the House of Lords (Lord Merthyr) directed the attention of the House, under standing orders, to certain special circumstances in the Kent County Council Bill. As deposited, the Bill had 442 clauses and 6 Schedules. The main special circumstance, which was not unprecedented in private Bills, was that the Bill conferred powers on authorities other than the promoters. Lord Merthyr stated that only 46 of the 442 clauses exclusively concerned the promoters; and that 238 clauses conferred powers on other authorities (county district councils and parishes) exclusively (209 H.L. Deb. 233–247).

On May 21, 1958, Lord Merthyr moved: that in the opinion of this House the principle that a County Council Bill should not confer on local authorities or on any other authority or person functions in which the county council has no interest should, pending any further inquiry, in general be observed in private legislation. Lord Mancroft (Minister without Portfolio) indicated that the setting up of a Joint Select Committee or similar body to examine the question was the proper solution. He also said: " The Government certainly agree that county councils ought not to promote Bills conferring on their district councils a host of powers for which there is no particular local need . . . On the other hand it may be perfectly proper for county councils to seek certain powers on behalf of their district councils when those powers are justified by local need." The motion was carried (209 H.L. 473–540).

Scotland

The Scottish Home Department has published Local Government in Scotland (H.M.S.O. 49–423).

See also COMPULSORY PURCHASE (above, p. 275), GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 277), HOUSING (above, p. 278), PUBLIC HEALTH (below, p. 290), SCOTLAND (below, p. 291), TOWN AND COUNTRY PLANNING (below, p. 292).

MONOPOLIES AND RESTRICTIVE PRACTICES

Restrictive Practices Court

Direction. The President of the Board of Trade stated on March 20, 1958, that he had given a further direction to the Registrar about the order in which registered agreements would be taken before the court.

About 250 agreements were listed under the new direction. They concerned such matters as the fixing or recommending of minimum prices, standard conditions of sale and exclusive dealing. The classes of goods covered were as follows: Baths; bricks, including refractory bricks; contractors' plant; domestic pottery; dustbins; electric lighting equipment and fittings; engraved printing blocks; fencing and fencing materials; galvanised tanks; glycerine; metal bedsteads; motor-cars and commercial vehicles; newspapers; paint; paper; paperboard; periodicals; road or other construction materials of any of the following descriptions: aggregates, whether coated or not; asphalts; ballast; bituminous road emulsions; gravel; pre-cast concrete products; roadstone; sand; ropes; steel drums and kegs; tyres; vulcanised fibre (584 H.C. Deb. *165*).

The Office of the Registrar has announced that 19 of the agreements covered by the Board of Trade's two previous directions have been abandoned, and notices have been issued in respect of 46, of which 3 have since been abandoned. In 28 of the remaining 43 cases the respondents have needed an extension of time for stating their case, and this has been agreed by the Registrar. In 11 a further extension has been granted by the court. Statements have been filed in 14 cases and are expected shortly in 17 more. So far the Registrar's answer has been given in 3 cases.

Work. On May 7, 1958, the Lord Chancellor was asked to make a statement upon progress in referring restrictive trading agreements to the Restrictive Practices Court. The Lord Chancellor replied that the court sat in open court for the first time on April 22, and fixed dates for the hearing of three cases during the Michaelmas Term. He answered supplementary questions concerning the length of time between the creation of the court and its first hearings; and concerning other like matters (209 H.L. Deb. 23–27).

NATIONAL HEALTH SERVICE

Advisory bodies

Reports have been published for 1957 of the Central Health Services Council (H.C. 210 of 1957–58) and the Scottish Health Services Council (H.M.S.O. 49–412–0–57).

Constitutions

Statutory amendment. The National Health Service Contributions Act, 1958 (6 & 7 Eliz. 2, c. 10) received the Royal Assent on April 30, 1958. This Act provides new rates of National Health Service contributions to replace those contained in the National Health Service Contributions Act, 1957.

The appointed day for this Act is July 7, 1958 (S.I. 1958, No. 880).

Finance

Accounts for 1956–57 have been published of Regional Hospital Boards, Boards of Governors of Teaching Hospitals, Hospital Management Committees, Executive Councils and the Dental Estimates Board for England and Wales (H.C. 143 of 1957–58) and the like bodies for Scotland (H.C. 151 of 1957–58); together with the Reports of the Comptroller and Auditor General thereon.

Prescribing

Interim Report has been published of the Committee (Chairman: Sir Henry Hinchliffe) on the cost of prescribing (H.M.S.O. 32–448).

Remuneration

Royal Commission. The Minutes of Evidence have been published of the 8th day (General Dental Practitioners Association); 9th day (General Practice Reform Association); 10th and 11th days (Royal Faculty of Physicians and Surgeons of Glasgow, Royal College of Surgeons of Edinburgh, Royal College of Physicians of Edinburgh); 12th and 13th days (British Dental Association).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 293).

NATIONAL INSURANCE

Benefits

Belgium. A convention on social security between the U.K. and Belgium, signed on May 20, 1957, has been ratified and came into force on June 1, 1958. It covers national insurance, industrial injuries and family allowances (S.I. 1958 No. 771; 588 H.C. Deb. 896, May 19, 1958).

France. A revised convention on social security between the U.K. and France, signed on July 10, 1956, has been ratified and came into force on May 1, 1958. It covers national insurance and industrial injuries (S.I. 1958 No. 597).

Malta. An Order has been made giving effect to a reciprocal agreement (S.I. 1958 No. 772).

Time for claims. On May 8, 1958, the House of Commons debated on the adjournment the time limits within which benefits must be claimed (587 H.C. Deb. 1569–76).

Yugoslavia. A convention on social security was signed between the U.K. and Yugoslavia on May 24, 1958. It covers national insurance, industrial injuries and family allowances. Ratifications have not yet been exchanged (Cmnd. 443).

Decisions of the Commissioner and the Tribunal

Absence from Great Britain. After working in Great Britain for over 2 years an Italian woman, feeling in poor health, returned to Italy in 1952 for a rest. Later she claimed benefit and said that she hoped to go back to Great Britain after a period of rest in Italy. She had not consulted a doctor before leaving Great Britain but received medical treatment in Italy. *Held* that, in relation to the Residence and Persons Abroad Regulations, she was not temporarily absent from Great Britain. In relation to the Italian Reciprocal Agreement she had not gone to Italy for the specific purpose of being treated. Meaning of phrase in Italian agreement " shall remain entitled to . . . benefit for sickness " discussed: Decision No. R(S) 3/58.

Compensation for loss of remuneration. A general sales manager with salary of £3,500 a year and prospects of a directorship had no express agreement oral or written as to duration of employment or notice required for termination. His appointment was terminated without notice and he was paid a sum equivalent to eight months' salary which was described as compensation for loss of office. *Held,* that having regard to the claimant's status, responsibilities and prospects, a reasonable period of notice was six months. Accordingly part of the sum he received was compensation for loss of remuneration for this period: Decision No. R(U) 10/58.

Day of unemployment. A laundry worker normally worked on five days a week but was working only four days a week, Monday to Thursday. She claimed unemployment benefit for Friday and Saturday. She was employed under an agreement by which she was guaranteed a weekly wage. In return she was required, in any week, to place her services at her employer's disposal throughout the period of her ordinary employment. *Held,* that the period of her ordinary employment was for five days a week and that she was not unemployed on Friday. Therefore, having been employed in that week to her full normal extent, Saturday was not a day of unemployment: Decision No. R(U) 2/58.

A worker was subject to an industrial agreement whereby Whit Monday was a normal working day for which a holiday bonus was payable whether or not he was required to work. He was not so required and received the bonus payment only. *Held,* that the claimant was not unemployed on Whit Monday. The agreement meant that he undertook to keep himself at the disposal of his employer on that day in return for the payment guaranteed: Decision No. R(U) 5/58.

Financial assistance. A woman in receipt of sickness benefit was separated from her husband. She had a court order for maintenance by him, but he was not currently making payments to her. He had, however, overpaid arrears and was in credit under the order. *Held,* that she was not unable to obtain any financial assistance from her husband during the period in question: Decision No. R(S) 4/58.

A married woman, living apart from her husband, had a maintenance order for £2 a week. Her husband had served a prison sentence and arrears of maintenance had been expunged. Since his release from prison eight months earlier he had paid her £24 of which she received £8 shortly after her incapacity began. *Held,* that she was not unable to obtain any financial assistance from her husband, although the payment she received would, no doubt, be allocated to reducing the arrears: Decision No. R(S) 5/58.

Repayment—good faith. Claimant's doctor certified that he was likely to remain incapable of work for a further four weeks. Before the end of that period the doctor certified that the claimant was fit to resume work. After the final certificate was received by the Ministry a postal draft was sent to the claimant for a period subsequent to the date claimant was certified to be capable of work. The claimant cashed the draft believing it was for the amount due. *Held*, that there was no sufficient reason to attribute lack of good faith to the claimant: Decision No. R(S) 2/58.

Share-fishermen. A share-fisherman claimed benefit when his vessel did not sail due to the absence of one member of the crew whose father was ill. The crew had been depleted for the preceding two days but a replacement had been available. *Held,* that there was no good cause necessitating abstention from fishing. It could not be said that the crew as a whole were left with no real choice in the matter. The abstention therefore was not of necessity: Decision No. R(U) 6/58.

A share-fisherman, who normally fished by line, did not put to sea because to have done so would have been unprofitable. The fish were not taking bait and he was unable to change to net fishing which could have been prosecuted successfully. He claimed that he had good cause necessitating abstention from fishing, namely, an absence of fish. *Held,* that there was no absence of fish and that good cause necessitating abstention from fishing was not established. The Act and regulations purport to insure against loss of employment, not loss of profit: Decision No. R(U) 11/58.

Trade dispute. A labourer at a shipyard was discharged on the day before a stoppage of work due to a trade dispute began there. He did not resume at the shipyard when the stoppage was over but later took employment as a seaman. *Held,* that the twelve days' rule applied. It was for the claimant to prove that his lack of employment during the stoppage was not due to the dispute and he had not done so: Decision No. R(U) 9/58.

A ship's joiner, employed by a firm of ship-repairers, was dismissed along with 1,400 others, on the day before a stoppage of work due to a trade dispute in the shipyards. He resumed employment in the shipyards shortly after the stoppage ended. *Held,* that the twelve days' rule applied. The onus was on the claimant to rebut the presumption that he had lost employment by reason of the stoppage and he had not done so: Decision No. R(U) 8/58.

The claimant was one of about forty workers (out of a total of about ninety) who withdrew their labour when three of their workmates were dismissed as redundant. The employer engaged twenty-six replacements before the dispute was brought to an end by an agreement to reinstate the strikers in groups on various dates, the first group being the largest. Subsequently there was further redundancy due to trading circumstances. *Held,* that there was a stoppage of work which lasted until the first group of workers returned to work under the agreement: Decision No. R(U) 7/58.

Finance

Accounts have been published of the National Insurance Fund, the National Insurance (Reserve) Fund, the Industrial Injuries Fund and the National Insurance (Existing Pensioners) Fund, for 1956–57; together with the Report of the Comptroller and Auditor General thereon (H.C. 140 of 1957–58).

Report. The Seventh Interim Report by the Government Actuary for 1957 has been published (H.C. 179 of 1957–58).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 293).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Benefits

Belgium, France, Malta, Yugoslavia. See above, pp. 281–282.

Decisions of the Commissioner and the Tribunal

"*Out of and in the course of employment.*" A gardener-labourer at a cemetery was employed in spraying weeds with a solution containing sodium chlorate. The protective clothing supplied had been torn and in spite of repair was not adequate to prevent his trousers becoming soaked with the solution. While at home a spark from a cigarette set alight the trousers of the claimant, who suffered extensive burns. *Held,* that injury benefit was disallowed. The injury was caused by the setting alight of the trousers, which was a separate accident not arising out of the claimant's employment: Decision No. R(I) 4/58.

Prescribed disease. An electric welder using electrode rods containing not more than 0·5 per cent. of hard free silica claimed disablement benefit on account of pneumoconiosis. *Held,* that pneumoconiosis was prescribed in relation to the claimant. The Commissioner discusses the amount of free silica which cannot be disregarded: Decision No. R(I) 2/58.

Special hardship allowance. A foreman blacksmith who was in receipt of disablement benefit and special hardship allowance obtained employment as a colliery blacksmith. His probable earnings were £11 5s. 9d. a week and in addition he was entitled each month to one ton of coal, of which the pithead price was £4 13s. 8d. The probable earnings in his former occupation were £11 10s. 2d. a week. *Held,* that an increase of disablement benefit was not payable. The value of concessionary coal is a return for services rendered and should be included in the assessment of probable remuneration: Decision No. R(I) 3/58.

A driver/loader had resumed his pre-accident occupation and was in receipt of full wages. He claimed special hardship allowance because, in fact, he acted as a driver only and paid 5s. a week each to two fellow-employees to do his share of carrying and loading. *Held,* that special hardship allowance was payable. The payment made for part of his work to be done indicated that he was incapable of following his regular occupation (R(I) 29/52 distinguished): Decision No. R(I) 5/58.

Finance

Report. The Seventh Interim Report by the Government Actuary for 1956–57 has been published (H.C. 216 of 1957–58).

Prescribed Diseases

Report has been published of the review of the prescribed diseases schedule by the Industrial Injuries Advisory Council (Chairman: Professor Sir Arnold Plant) on the question whether any adjustments should be made in the terms of prescription of prescribed diseases other than pneumoconiosis and byssinosis (Cmnd. 416).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 293).

NATIONALISED INDUSTRIES

General

Capital investment. A White Paper on capital investment in the coal, gas and electricity industries has been published (Cmnd. 415). Figures for capital expenditure on fixed assets are:

	£ *million*			
	1956	1957		1958
	Actual	Approved	Estimated	Approved
National Coal Board	96	107	103(*b*)	100
Central Electricity Authority (*a*) (*c*)	206	233	235	239
South of Scotland Electricity Board	17	20	19(*b*)	26½
North of Scotland Hydro-Electric Board	20	21	17(*b*)	17
Gas Council and Boards (*a*) ...	51	59	57	53½
TOTAL	390	440	431	436

(*a*) Financial years April–March.
(*b*) Actual.
(*c*) Electricity Council and Boards from January 1, 1958.

Parliamentary examination. The Select Committee on Nationalised Industries (Reports and Accounts) has published a further Report. This concerns the National Coal Board and is based on the Report and Accounts for 1956. The major topics examined by the Committee were investment, manpower, prices and the problem of the balance between the amounts of large and small coal produced.

The Committee took evidence on five occasions (in addition to the three meetings in the previous session) from the Chairman and Deputy-Chairman of the Board, the Permanent Secretary and a Deputy-Secretary of the Ministry of Power, and Mr. Grant, the Under Secretary at the Treasury who gave evidence in the previous session.

The Committee made a number of recommendations (H.C. 187—I of 1957–58; for the previous Report, see above, p. 83).

Airways

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the British Overseas Airways Corporation (H.C. 165 of 1957–58) and the British European Airways Corporation (H.C. 166 of 1957–58).

Atomic Energy

Balance sheet of the Atomic Energy Authority as at March 31, 1957, has been published, together with a report of the Comptroller and Auditor General thereon (H.C. 193 of 1957–58).

Coal

Account of the sums issued out of and received from the Consolidated Fund and of the sums received from the National Coal Board in respect of interest and repayment of advances and recoupment of Crown expenses and liabilities, and of the disposal of those sums for 1956–57 has been published, together with the report of the Comptroller and Auditor General thereon (H.C. 203 of 1957–58).

Distribution costs. The Committee of Inquiry (Chairman: Sir Thomas B. Robson) into coal distribution costs in Great Britain has reported (Cmnd. 446).

Reports and Accounts for 1957 of the National Coal Board have been published in two volumes (H.C. 180 and 181 of 1957–58).

Statutory control. The Paymaster-General stated that the Government had decided that the statutory control of house coal supplies and prices should be brought to an end at an early date—about the middle of July—and that control of the prices of coke and manufactured fuels would end at the same time (589 H.C. Deb. 42–44; see also 209 H.L. Deb. 635–638; June 10, 1958).

Electricity

Circular. The Ministry of Housing and Local Government has issued a Circular drawing the attention of local planning authorities to certain provisions of the Electricity Act, 1957, and informing them of certain changes which are being made in the procedure for obtaining consent to the construction of new generating stations and overhead lines (Circular No. 28/58).

Financial years. The Electricity (Financial Years) Regulations, 1948, provide that the financial year of an Electricity Board, other than the North of Scotland Board, shall end on March 31. By virtue of section 2 (8) of the Electricity Act, 1957, an Electricity Board includes the Central Electricity Generating Board. New regulations have been made amending those Regulations so as to apply them to the Electricity Council also.

The opportunity has at the same time been taken to indicate the effect of the amendment to subsection (1) of section 67 of the Electricity Act, 1947, under section 15 of, and Part II of the First Schedule to, the Electricity Reorganisation (Scotland) Act, 1954, whereby the South of Scotland Board as well as the North of Scotland Board become excepted from the Regulations. (S.I. 1958 No. 509.)

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the North of Scotland Hydro-Electric Board (H.C. 169 of 1957–58), the South of Scotland Electricity Board (H.C. 170 of 1957–58) and the Electricity Council (H.C. 167 of 1957–58).

Undue preference. The pursuers, who had been high voltage consumers, claimed that the defenders' tariff, which provided for lower rates to be charged to high voltage consumers than to low voltage consumers, nevertheless constituted an undue preference for the low voltage consumers because of the lower cost of producing high voltage electricity. The defenders alleged that, as the pursuers had at all times paid less than low voltage consumers, there could not have been an undue preference of the latter or undue discrimination against the pursuers and other high voltage consumers. The pursuers claimed to recover £10,000 as the amount by which it was alleged the defenders had overcharged the pursuers. The Court of Session, Inner House, Lord Mackintosh dissenting, *held* that the fact that the pursuers had been charged less than low voltage consumers did not necessarily exclude the possibility that there had been an undue preference of the low voltage consumers contrary to section 37 (8) of the Electricity Act, 1947. The court also held that it was possible to order an inquiry to ascertain what a fair charge would have been, and that the pursuers would be entitled to recover the balance: BRITISH OXYGEN CO. *v.* SOUTH OF SCOTLAND ELECTRICITY BOARD, 1958 S.L.T. 113.

Gas

The Treasury issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 168 of 1957–58).

Transport

Consultative Committees. The reports for 1957 have been published of the Central Transport Consultative Committee for Great Britain (H.C. 131 of 1957–58), and the Transport Users' Consultative Committees for Scotland (H.C. 132 of 1957–58) and for Wales and Monmouthshire (H.C. 133 of 1957–58).

The Minister of Transport and Civil Aviation published the names of the interests represented and bodies consulted and the names of the members of these committees and also of the consultative committees for the areas of East Anglia, East Midlands, London, North Eastern, North Western, South Eastern, South Western, West Midlands and Yorkshire (589 H.C. Deb. 1076–94, June 18, 1958).

Debate. The House of Commons on April 22, 1958, in Committee of Supply debated the Government's transport policy (586 H.C. Deb. 781–912).

Guarantee. The Treasury issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 171 of 1957–58).

Report and accounts of the British Transport Commission for 1957 have been published in two volumes (H.C. 215—I, II, of 1957–58).

Transport Tribunal. See below, p. 296.

PARLIAMENT

Constitution

House of Commons. The House of Commons (Redistribution of Seats) Act, 1958 (6 & 7 Eliz. 2, c. 26) received the Royal Assent on May 14, 1958. This Act amends the House of Commons Redistribution of Seats Act, 1949 (12, 13 & 14 Geo. 6, c. 66) and contains seven sections and a Schedule. Section 1 makes changes in the constitution of the Boundary Commissions for England, Scotland, Wales and Northern Ireland; and provides that the deputy chairman of the Commission will, in the case of England and Wales, be a judge of the High Court appointed by the Lord Chancellor and makes comparable provisions in the case of the Commissions for Scotland and Northern Ireland. Section 2 extends the period between general reviews of constituencies under section 2 of the 1949 Act to ten years minimum and fifteen years maximum and makes certain other minor amendments to that section. Section 3 provides for a separate electoral quota for each part of the United Kingdom. Section 4 provides for the publication of notices and the holding of local inquiries. Section 5 amends section 1 (3) of the 1949 Act to ensure that the County Borough of Newport is treated as part of Wales for the purposes of that Act. Section 6 contains consequential amendments of the 1949 Act.

House of Lords. The Life Peerages Act, 1958 (6 & 7 Eliz. 2, c. 21) received the Royal Assent on April 30, 1958. The Act empowers Her Majesty to confer life peerages which entitle the person on whom the title is conferred (*a*) to rank as a baron (*b*) to sit and vote in the House of Lords. It is expressly provided that such a life peerage may be conferred on a woman (see also above pp. 84–88).

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates issued its Fourth Special Report (being the observations of the Minister of Health on the Sixth Report of the Committee in 1956–57, on Running Costs of Hospitals) (H.C. 129 of 1957–58).

The Committee issued its Second Report (on the Ministry of Power) (H.C. 198 of 1957–58).

Members

House of Commons Fund. The Accounts for 1956–57 have been published, together with the report of the Comptroller and Auditor General thereon (H.C. 149 and 1957–58).

Nationalised Industries

See NATIONALISED INDUSTRIES, **General** (above, p. 285).

Privilege

Article 9 of the Bill of Rights, 1688, provides "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." Section 1 of the Parliamentary Privilege Act, 1770, provides ". . . any person . . . may at any time commence and prosecute any action or suit in any court . . . against . . . any . . . Lord of Parliament of Great Britain, or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the House of Commons of Great Britain . . . or any other person intituled to the privilege of Parliament . . . and no such action . . . shall at any time be impeached, stayed or delayed by or under colour or pretence of any privilege of Parliament." The Act of 1770 applies only to proceedings against members of Parliament in respect of their debts and actions as individuals and not in respect of their conduct in Parliament as members of Parliament, and does not abridge or affect the ancient and essential privilege of freedom of speech in Parliament.

L. had threatened to institute proceedings for libel against S., a member of the House of Commons, in respect of a statement made by S. in the course of a proceeding in Parliament. Pursuant to a recommendation of the Committee of Privileges and an Order in Council, the Judicial Committee was asked to decide "whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges." *Held*, that the question should be answered in the negative.

Per curiam: "Their Lordships . . . express no opinion whether the proceedings referred to in the introductory paragraph were 'a proceeding in Parliament,' a question not discussed before them, nor on the question whether the mere issue of a writ would in any circumstances be a breach of privilege": *Re* PARLIAMENTARY PRIVILEGE ACT, 1770 [1958] 2 W.L.R. 912; [1958] 2 All E.R. 329, P.C. (See also Cmnd. 431; 587 H.C. Deb. 1229–1232, May 7, 1958.)

Procedure

Leave of absence (*House of Lords*). The Select Committee on Leave of Absence issued its Report (H.L. (60) of 1957–58) and on April 24, 1958, the House of Lords debated the Report (208 H.L. Deb. 1005–82). On June 16, 1958, the House of Lords resolved to amend Standing Orders by leaving out S.O. 21 and inserting a new S.O. 21. Under the new S.O. a Lord may apply for leave of absence for a session or the remainder of a session or the remainder of a Parliament. On the issue of writs for the calling of a new Parliament, the Lord Chancellor is required to request every Lord whether he wishes to apply for leave of absence, and similarly before the beginning of every session. A Lord who fails to answer within twenty-eight days may be granted leave of absence. A Lord who has been granted leave of absence "is expected not to attend the sittings of the House" unless he gives special notice of at least one month.

The House also resolved to appoint a Select Committee (of the three party Whips) for the general supervision of the arrangements relating to leave of absence (209 H.L. Deb. 891–971; see also above, p. 89).

Motion in Committee of Supply. A Member proposed to move an Amendment in Supply in the following terms: that an inquiry is desirable into the personal powers, capacities and previous training which influence the selection and appointment of chief constables, having regard to their far-reaching authority and their relations with Her Majesty's inspectors of constabulary and the public in general. The Member had given notice that he intended to draw attention to the powers of chief constables. The Speaker said that a Member had three hurdles to surmount in such motion. The first was that the terms of the Amendment must be within the terms of notice. The second was that the subject raised must be one for which a Minister was responsible. The third was that the grievance must not involve legislation for its remedy. The Speaker said that the Member had fallen on the first. He said that the crux of the difficulty was that the control of local police forces was in the hands of the local authority. To make a Minister responsible would mean legislation. The Member could proceed, by way of a Bill or on Private Member's motion, if he was successful in the ballot. But he could not raise the matter on Supply or on the Adjournment (586 H.C. Deb. 1297–99, April 25, 1958).

Public Accounts Committee (House of Commons)

Report. The Committee issued its 2nd Report (on virement between votes of Service Departments) (H.C. 213 of 1957–58).

Statutes

Royal Assent. The British Nationality Act, 1958 (6 & 7 Eliz. 2, c. 10) (see below, p. 296) received the Royal Assent on February 20, 1958; the Life Peerages Act, 1958 (6 & 7 Eliz. 2, c. 21) (see above, p. 287) and the National Health Service Contributions Act, 1958 (6 & 7 Eliz. 2, c. 20) (see above, p. 281) received the Royal Assent on April 30, 1958; the Christmas Island Act, 1958 (6 & 7 Eliz. 2, c. 25) (see below, p. 301) and the House of Commons Redistribution of Seats) Act, 1958 (6 & 7 Eliz. 2, c. 26) (see above, p. 287) received the Royal Assent on May 14, 1958.

See also WIRELESS AND TELEVISION (below, p. 296).

PUBLIC AUTHORITIES

Agricultural Land Commission

Accounts have been published of the management and the farming of land by the Commission and the Welsh Agricultural Land Sub-Commission for 1956–57, together with the Report of the Comptroller and Auditor General thereon (H.C. 141 of 1957–58).

Ancient Monuments Boards

Reports for 1957 have been published for England, Scotland and Wales (H.C. 200 of 1957–58).

British Sugar Corporation

Incentive agreement. An Order has been made under section 19 of the Sugar Act, 1956, directing that effect shall be given, in accordance with section 20 of that Act, to an incentive agreement (reproduced in the Schedule) concluded between the Minister of Agriculture, Fisheries and Food, the Secretary of State for Scotland and the Corporation (S.I. 1958 No. 936).

Herring Industry Board

Report for 1957 has been published (Cmnd. 435).

Historic Buildings Councils

Reports for 1957 have been published for the Councils for England and for Wales (H.C. 190 and 191 of 1957–58).

Iron and Steel Holding and Realisation Agency

Accounts for 1956–57 have been published of the Realisation Account and of the receipt and disposal of securities coming into the hands of the Treasury or their nominees, together with the Report of the Comptroller and Auditor General thereon (H.C. 150 of 1957–58).

National Assistance Board

Report for 1957 has been published (Cmnd. 444).

National Film Finance Corporation

Report and accounts for 1957–58 have been published (Cmnd. 448).

Sugar Board

Account for 1956–57 has been published of the sums received by the Minister of Agriculture, Fisheries and Food from the Consolidated Fund, of advances made by him to the Board and of payments to the Exchequer, together with the Report of the Comptroller and Auditor General thereon (H.C. 152 of 1957–58).

White Fish Authority

Account for 1956–57 has been published of receipts and payments of grants, together with the report of the Comptroller and Auditor General thereon (H.C. 153 of 1957–58).

PUBLIC HEALTH

Regulation

Air pollution. The Ministry of Housing and Local Government has published a memorandum on the industrial provisions of the Clean Air Act, 1956 (H.M.S.O. 75–59).

REMEDIES

Certiorari

Section 25 of the Agricultural Holdings Act, 1948, involves a comparison between the position under an existing tenancy of an agricultural holding and the proposed position which will come about in future if the tenancy is terminated; the landlord must give some evidence of the proposed user and the tribunal must then proceed to make a comparison.

The tenant of an agricultural holding having been served with a notice to quit, served a counter-notice on his landlord, the effect of which was to render the notice to quit ineffective unless the Minister consented to its operation. The Agricultural Executive Committee, acting on behalf of the Minister, gave its consent. The Agricultural Land Tribunal, in dismissing the appeal, said that " the landlords have satisfied the tribunal that it is in the interests of efficient farming . . . to terminate the tenancy . . ." The landlord stated, according to the Statement of the Case prepared by the Agricultural Executive Committee, that if he obtained possession he had not decided whether to sell or re-let. The tenant applied for an order of certiorari to quash the tribunal's decision for error on the face of the award. *Held,* refusing the application, that it did not appear on the face of the tribunal's decision that the tribunal had failed to make the vital comparison between the tenant's present use and the landlord's proposed use of the land, and if it was contended that the tribunal had nevertheless erred in law, the proper remedy was by way of appeal, not certiorari: DAVIES *v.* PRICE [1958] 1 W.L.R. 434; [1958] 1 All E.R. 671, C.A.

The decision of the Patents Appeal Tribunal is one of an inferior tribunal to which an order of certiorari will issue.

A company made an application for a patent which was opposed by the owners of a prior patent. The superintendent examiner, on behalf of the comptroller, ordered that the patent applied for be sealed with a reference to the prior patent. The Patents Appeal Tribunal reversed that decision and the owners of the prior patent applied for certiorari on the ground that there was an error of law on the face of the record in that the tribunal had misconstrued the specification. *Held*, that, although an order of certiorari lay to the Patents Appeal Tribunal, the court, in determining whether or not there was an error on the face of the record, could not consider the evidence which had been given before the tribunal in order to construe a document which formed a part of the record: R. *v.* PATENTS APPEAL TRIBUNAL, *ex p.* BALDWIN & FRANCIS [1958] 2 W.L.R. 1010; [1958] 2 All E.R. 368, C.A.

G.'s left leg had been injured in the First World War. Recently his right leg was injured in an industrial accident. The Medical Appeal Tribunal failed to apply the " paired organs " principle under reg. 2 (5) of the Regulations of 1948 when assessing G's disability in respect of his recent injury. *Held*, allowing an application for certiorari, that the legs were " similar organs, the function of which would be interchangeable or complementary," and that the " paired organs " principle accordingly applied: R. *v.* MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT, *ex p.* GRIFFITHS [1958] 1 W.L.R. 517; [1958] 2 All E.R. 227n., D.C.

A medical board had awarded H. a final, permanent, disability assessment of 5 per cent. H. appealed to the medical appeal tribunal against the diminutive size of the award. The tribunal set the award aside. Subsequently H. obtained a fresh medical report and asked for a review of the tribunal's decision under section 40 of the National Insurance (Industrial Injuries) Act, 1946. H. applied for certiorari to quash the tribunal's decisions. *Held* (1) that an appeal to the tribunal was not in the nature of a *lis inter partes*, and that the tribunal had been fully entitled to set the award aside; and (2) that H. was not entitled to ask for a review of his case by the tribunal, since the medical report in the circumstances did not amount to fresh evidence within section 40 (1): R. *v.* MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), *ex p.* HUBBLE [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374, D.C.

The commissioner of Limassol imposed a collective fine of £35,000 on the Greek-Cypriot inhabitants in the area, in purported pursuance of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955. The regulations provided for the imposition of such a fine if the community failed to take reasonable steps to prevent the commission of offences; but before such a fine could be imposed the commissioner was obliged to hold an inquiry and " to satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon . . ." The regulations had been made in pursuance of section 6 (1) of the Emergency Powers Order in Council, 1939, which provides that " The Governor may make such regulations as appear to him to be necessary or expedient for securing the public safety . . . the maintenance of good order." On an application for a writ of certiorari, the Supreme Court brought up and quashed the commissioner's order; and the Court of Appeal affirmed the decision. Thereafter the commissioner swore two affidavits setting out the full facts of the inquiry which he had made before imposing the fine. *Held*, allowing the appeal, that the regulations were related to the purposes prescribed by the Order in Council; and that, on the evidence, the commissioner had satisfied the requirements of the regulations: ROSS-CLUNIS *v.* PAPADOPOULLOS [1958] 1 W.L.R. 546; [1958] 2 All E.R. 23, P.C.

SCOTLAND

Industry and Employment

Reports for 1957 have been published on industry and employment and on Scottish roads (Cmnd. 384).

Local Government and Central Departments

Review. During the debate in the House of Commons in July, 1957, on Local Government Finance the Secretary of State said that, as a consequence of the Government's proposals to merge certain grants in the general grant and to abolish others, it was proposed to carry out " a review of the administrative arrangements and whenever this seems desirable to leave local authorities to transact their business without reference to the central department " (574 H.C. Deb. 1086, July 30, 1957). This review has been carried out and a White Paper published which deals with land transactions, control of capital investment, borrowing periods, contracts, statutory committees, administrative schemes, publicity regulations, control of staff establishments, examination and audit of local authorities' accounts and education approvals (Cmnd. 445).

Prisons

Report for 1957 has been published (Cmnd. 429).

See also COURTS (above, p. 275), CRIMINAL LAW (above, p. 277); GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 277); LOCAL GOVERNMENT (above, p. 279); NATIONAL HEALTH SERVICE (above, p. 281).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (*House of Commons*). On April 22, May 6 and 20, and June 24, 1958, the Committee considered 37, 22, 12 and 31 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for memoranda from Government Departments in respect of two instruments (H.C. 11–X, XI, XII, XIII).

Special Orders' Committee (*House of Lords*). In the Fifth, Sixth, Seventh and Eighth Reports, the Committee examined thirteen instruments. The Committee found that one instrument raised important questions of policy or principle, and could not be passed by the House without special attention, that four were not founded on precedent, but that all could be approved without further special inquiry (H.L. (53), (75), (93), (117) of 1957–58).

TOWN AND COUNTRY PLANNING

Enforcement notice

In June, 1956, a company placed an automatic coin-operated ice-cream sales machine on the forecourt outside its premises, which it used as an ice-cream parlour. There were holes in the base of the machine whereby it could be bolted to the ground when in use; the refrigeration plant in the machine was operated by electricity supplied through a cable. No planning permission was sought or obtained for the machine. By an enforcement notice, served by the local planning authority, the company was required to remove the machine. The company appealed to the justices against the notice under section 23 (4) of the Town and Country Planning Act, 1947. The justices held that there had been no development within section 12 (2) of the Act and quashed the notice. On appeal by the local authority, *held* (Lord Goddard C.J. dissenting), that the justices had no jurisdiction under section 23 (4) of the Town and Country Planning Act, 1947, to determine whether in fact development within section 12 of the Act had taken place; they must assume that it had taken place. The jurisdiction of the justices was limited to ascertaining whether permission had been granted or whether the alleged development fell within the class of development for which permission was not required: EASTBOURNE CORPORATION *v.* FORTES ICE CREAM PARLOUR (1953) [1958] 2 W.L.R. 886; 2 All E.R. 276, D.C.

Material change of use

Land was used for the storage of scrap metal from 1943 to 1949 and then stood vacant till 1956 when it was again used for storage purposes. The local planning authority served on the owner and occupiers of the land an enforcement notice under section 23 of the Town and Country Planning Act, 1947, alleging that there had been a material change in the use of the land and that the resumption of the use constituted a new use for which planning permission had not been obtained. On appeal against the notice under section 23 (4) of the Act, the justices found that there had been no material change in the use of the land and that therefore no permission was required. *Held,* that the question was not whether there had been a discontinuance of a particular use, but whether there had been a material change in the use, within section 12 of the Act, since July 1, 1948, and the justices were entitled to come to the conclusion that there had not: FYSON *v.* BUCKINGHAMSHIRE COUNTY COUNCIL. METAL RECOVERY AND STORAGE CO. *v.* SAME [1958] 1 W.L.R. 634; [1958] 2 All E.R. 286n., D.C.

Motorways

Circular. The Ministry of Housing and Local Government has issued a circular dealing with the control of development alongside special roads to be provided by the Minister of Transport and Civil Aviation (Circular No. 25/58).

Petrol stations

Circular No. 25/58 (above) also deals with planning applications for petrol stations on trunk and other roads.

Planning permission

In 1955, H. applied to the local planning authority under Article 5 (2) of the General Development Order, 1950, for outline planning permission for the erection of a replacement cottage on a farm. Outline permission was granted subject to certain matters reserved and subject to the approval of plans to be submitted within two years of the granting of permission. In 1956 H. applied for approval of plans which he submitted siting the cottage on a different plot of ground, but the planning authority refused the application on the ground that the development was contrary to the planning proposals for the area. *Held,* that the land the subject of the outline permission was the whole farm and not just the plot on which the cottage was to be built; that the 1956 application was not a new application, and since the planning authority had already considered the matters reserved in the outline permission and had found nothing to which they wished to object, the authority could not now consider the reserved matters a second time; accordingly H. was entitled to a declaration that the outline permission was a good and valid permission which entitled H. to proceed with the erection of the new cottage: HAMILTON *v.* WEST SUSSEX COUNTY COUNCIL [1958] 2 W.L.R. 873; 2 All E.R. 174, Donovan J.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Tribunals and Inquiries. A circular and a memorandum have been issued by the Scottish Home Department (Circular No. 9231), and another circular by the Department of Health for Scotland (D.H.S. Circular 50/1958) following on the Report of the Committee on Administrative Tribunals and Inquiries. The Secretary of State for Scotland said that these documents had been drawn up in consultation with local authority associations and covered such points as: the holding of inquiries in public as a general rule; the provision of statements by local and other public authorities so that potential appellants or objectors might see the case they had to meet in good time before inquiries; the order in which parties to inquiries should be heard; the availability of departmental representatives to give evidence on matters of fact and expert opinion; facilities for parties to inspect and comment on the factual parts of inquiry reports before Ministerial decisions were reached; the issue, along with Ministerial decisions, of reports in full to the parties concerned, or their deposit for local inspection where this was more appropriate; and the continuance of the present practice of explaining Ministerial decisions in the letters issuing them, including in future an explanation of reasons for any departure from recommendations in the inquiry report (588 H.C. Deb. *19–20,* May 13, 1958).

The Tribunals and Inquiries Bill received its Second Reading in the House of Lords on April 1, 1958, passed through Committee on April 22 and 29, was Reported on May 13 and received its Third Reading on May 20 (208 H.L. Deb. 584–622, 852–908, 1088–1118; 209 H.L. Deb. 274–98, 471).

The Minister of Housing and Local Government was asked if he would make available the reports of his officers who attended accompanied visits to ascertain the views of appellants and authorities in appeals under the Control of Advertisements Regulations. He replied that these visits were not inquiries and were not made by inspectors. The main object was to enable one of his officers to inspect the site of an appeal with representatives of the parties and to report on it. Different considerations therefore arose from those which applied to inquiries. He believed that the procedure had been convenient to applicants and it was wholly impartial. He had under consideration, however, whether he could make the reports available (588 H.C. Deb. *35–36,* May 14, 1958).

Disciplinary bodies

Dental committee. An Order has been made, under the Dentists Act, 1957, enacting Rules to revoke and replace the Rules enacted by the Dentists Act, 1956 (Judicial Committee Rules) Order, 1956. The new Rules differ in certain respects from the Rules of 1956, by reason of new provisions in the Judicial Committee Rules, 1957, which have replaced the Judicial Committee Rules, 1925, as the principal rules of procedure of the Committee (S.I. 1958 No. 599).

Medical committee. An Order has been made, under the Medical Act, 1956, enacting Rules to revoke and replace the Rules enacted by the Medical Act, 1950 (Judicial Committee Rules) Order, 1951. The new Rules differ in certain respects from the Rules of 1951, by reason of new provisions in the Judicial Committee Rules, 1957, which have replaced the Judicial Committee Rules, 1925, as the principal rules of procedure of the Committee (S.I. 1958 No. 765).

Naval disciplinary courts. Orders have been made, by the Admiralty under section 50 (5) of the Naval Discipline Act, 1957, superseding General Orders made under section 57A (4) of the Naval Discipline Act, 1866. The jurisdiction of disciplinary courts is limited to offences committed in time of war by officers below the rank of Commander, which appear to the convening authority not to be of such a nature as to necessitate trial by court-martial. A disciplinary court may consist of fewer officers than a court-martial and the range of offences which it can try is more limited. Subject to these differences, the Orders apply the new court-martial procedure to disciplinary courts as far as possible. The Orders will come into operation on the date appointed for the commencement of the Naval Discipline Act, 1957 (S.I. 1958 No. 562).

Independent Schools Tribunal

Rules have been made prescribing the procedure to be followed in proceedings before an Independent Schools Tribunal set up under section 72 of the Education Act, 1944, to hear appeals against a notice of complaint served by the Minister of Education on the proprietor of an independent school or against a refusal of the Minister to remove a disqualification imposed as the result of such a notice (S.I. 1958 No. 519).

Medical Appeal Tribunal

Jurisdiction. The Minister of Pensions and National Insurance stated that to provide a further right of appeal in appropriate cases against decisions of Medical Appeal Tribunals required legislation and he had no statement to make at present (586 H.C. Deb. 594–5, April 21, 1958).

National Assistance Tribunal

Procedure. An Instrument has been made confirming Rules made by the National Assistance Board which amend the National Assistance (Appeal Tribunals) Rules, 1948 (which Rules provide for the procedure of Appeal Tribunals set up in accordance with the Fifth Schedule to the National Assistance Act, 1948), so as to permit an appellant or other person concerned to be legally represented at a hearing by an Appeal Tribunal (S.I. 1958 No. 714; see also 586 H.C. Deb. 594, April 21, 1958).

National Insurance and Industrial Injuries Tribunals

Determination of claims and questions. Regulations have been made amending the National Insurance (Determination of Claims and Questions) Regulations, 1948, so as to permit legal representation at hearings of local tribunals, to provide for hearings by local tribunals and the Commissioner to be held in public, to express the right of claimants and others to call and question witnesses at hearings by local tribunals and the Commissioner and to provide for appeal without leave to the Commissioner from decisions of local tribunals (S.I. 1958 No. 701).

The preliminary draft of these Regulations was submitted to the National Insurance Advisory Committee in accordance with section 77 of the National Insurance Act, 1946 (H.C. 184 of 1957–58).

Regulations have been made amending the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948, so as to remove the limitation upon the right to be represented by a barrister, advocate or solicitor at a hearing of a case by a local appeal tribunal and to provide for the calling of witnesses and the putting of questions directly to them in proceedings before the Commissioner, a local appeal tribunal or a medical appeal tribunal (S.I. 1958 No. 702).

On April 21, 1958, the Minister of Pensions and National Insurance stated that he did not think there was any chance in this Session for the introduction of legislation to give an automatic right of appeal from local tribunals to the Industrial Injuries Commissioner (586 H.C. Deb. 593–594).

On June 19, 1958, the above Regulations (S.I. 1958 Nos. 701, 702) and the National Assistance Rules (above, S.I. 1958 No. 714) were prayed against in the House of Commons. The mover of the motion (which was subsequently withdrawn) expressed some fears of the amendments which gave right to legal representation before national insurance local tribunals and of the amendment which provided that hearings should be in public unless the chairman otherwise directed (589 H.C. Deb. 1443–1472).

National service

Umpire's decisions. Three selected decisions by the Umpire in respect of applications for postponement of liability to be called up for service under the National Service Acts, 1948–55, have been published by the Ministry of Labour and National Service (N.S. Code 2 Pamphlet No. 1/58 containing Decisions Nos. 37/58, 38/58, 77/58 N.S.).

Planning appeals

Bulletin. The Ministry of Housing and Local Government has published Bulletin No. XIII of selected appeal decisions under the Town and Country Planning Act, 1947. It contains 42 decisions.

Transport Tribunal

Charges schemes. The British Transport Commission (inland waterways) charges scheme, 1958, and the B. T. C. (harbours) charges scheme, 1958, have been confirmed by Orders dated May 23, 1958 (H.M.S.O. 88–814, 815).

See also REMEDIES (above, p. 290).

WIRELESS AND TELEVISION

Television

Members' broadcasts. The Assistant Postmaster-General gave the numbers of M.P.s appearing on B.B.C. and I.T.A. television, by reference to political parties, between 1956 and March 31, 1958 (588 H.C. Deb. 398–400, May 14, 1958).

Political bias. The Assistant Postmaster-General answered questions about political bias in programmes, particularly a B.B.C. " Panorama " programme of April 28, 1958 and an I.T.A. programme " Polio 1958 " on the same night (588 H.C. Deb. 400–402, May 14, 1958).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development Corporation. The report and accounts for 1957 have been published (H.C. 164 of 1957–58).

Colonial Territories, 1957–58, has been published (Cmnd. 451).

Financial and economic co-operation within the Commonwealth. A debate on this subject took place in Committee of Supply on April 28, 1958, in the House of Commons (587 H.C. Deb. 28–133).

Nationality. The British Nationality Act, 1958 (6 & 7 Eliz. 2, c. 10) received the Royal Assent on February 20, 1958. It makes certain changes in the Act of 1948, which have become necessary because of the creation of the Federation of Rhodesia and Nyasaland and the granting of independence to Ghana. Other amendments are also made.

The following account of the purposes of the new legislation is taken from the speech of the Joint Under-Secretary of State for the Home Department who introduced the second reading in the House of Commons (581 H.C. Deb. 279–293, January 28, 1958).

The British Nationality Act of 1948 " was based on a new conception of nationality within the Commonwealth. Before 1948, all people in the United Kingdom, throughout the Colonies, and throughout the countries of the Commonwealth, were British subjects with only one form of nationality—they were all British subjects. Following the Commonwealth Citizenship Conference in 1947, it was agreed between the then countries of the Commonwealth that, although there should continue to be a common citizenship embracing all people who had formerly had British nationality, there should also be separate citizenships for each of the countries of the Commonwealth; and that separate citizenships should be a necessary way of entering into the common citizenship. Lastly, it was agreed that the United Kingdom and the Colonies should together form one type of separate citizenship. The other forms of separate citizenship were set out in section 1 (3) of the 1948 Act, which referred to citizenship of Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia . . . and Ceylon. Section 1 of the 1948 Act also said that a person enjoying the common status [which, in the United Kingdom is still called British nationality] could be known either as a British subject or as a Commonwealth citizen, and that the two expressions should have the same meaning. Some countries have preferred to use the one, and others have preferred to use the other, expression. Some countries permit the use of either. This Bill does not in any way disturb the fundamental conception which was written into section 1 of the 1948 Act. What it does is to bring the application of that Act up to date in the light of the changes in the Federation of Rhodesia and Nyasaland and in Ghana."

The first clause of the new legislation " deals with the Federation of Rhodesia and Nyasaland, and has been made necessary by the Citizenship Act which was passed last year by the Federal Parliament. Although it was passed some months ago, that Act will not come into operation until a date which has yet to be appointed by the Governor-General, and which will coincide with the date of the coming into operation of this Bill. It was felt by both Governments that that would avoid confusion. In this matter, we have to consider separately the position of the people in Southern Rhodesia—who were mentioned in section 1 (3) of the 1948 Act as people having separate citizenship—and the people in Northern Rhodesia and Nyasaland, which were protected territories, and recognised as such under that Act and previously. At present, the people of Southern Rhodesia, therefore, enjoy Southern Rhodesian citizenship as a result of their Citizenship Act which was passed soon after our 1948 Act, and, in the United Kingdom, as a result of the 1948 Act, they are recognised as British subjects. But the people in Northern Rhodesia and Nyasaland are . . . British protected persons: that is to say, they are not British subjects but they receive Her Majesty's protection in foreign countries and they are free to enter, and to remain in, the United Kingdom without restriction. When the Citizenship Act of the Federation comes into force, separate citizenship of Southern Rhodesia will be abolished, and citizens of Southern Rhodesia will become known as citizens of the Federation. But British-protected persons in Northern Rhodesia and Nyasaland will be entitled to register as Federal citizens if they so wish, and, if they do not wish to be so registered, they will remain British-protected persons merely by taking no action at all. . . . They are, therefore, in quite a separate position from the people of Southern Rhodesia, who will pass straight from Southern Rhodesian citizenship to Federal citizenship as a result of the Citizenship Act. . . ." If the Citizenship Act were to be brought into force without any change in the United Kingdom law, " the citizens of the Federation would not be British subjects in United Kingdom law, because the 1948 Act confers such status, not on citizens of the Federation as such, but only on some of them as citizens of Southern Rhodesia. . . ." When the Federation is inserted in the 1948 Act " as a country with separate citizenship, it will become necessary to decide whether the two Protectorates—the other parts of the Federation—are, for nationality purposes, to be treated as Protectorates or as parts of a country with separate citizenship. . . . The line . . . taken is to provide that references in the 1948 Act to a Protectorate shall not include Northern Rhodesia and Nyasaland. Nevertheless . . . in law, the net result will be that these two territories will retain their general status as Protectorates, in spite of being within the Federation, and that their inhabitants will not be deprived against their will of their cherished status as British-protected persons."

By the Ghana Independence Act, 1957, " Ghana has already been listed among those Commonwealth countries with the separate citizenship mentioned in . . . the 1948 Act . . . so that as soon as the Ghana Parliament enacted its own citizenship law, the result was that the people of Ghana would be recognised in the United Kingdom as British subjects and recognised in Ghana as citizens of Ghana. In fact, since that step was taken and the Ghana citizenship law was passed, the people of Ghana have had a dual status. They are citizens of Ghana and they are citizens of the United Kingdom and Colonies, and that is their present position. The logical step for us to take, and one which is in keeping with the 1948 conception of separate citizenship, is that the citizenship of the United Kingdom and Colonies should be withdrawn from those people in Ghana whose common citizenship within the Commonwealth is derived solely from their connection with Ghana, but leaving it for the others." That is what the second Clause of the Bill will achieve. " Broadly speaking, it takes away citizenship of the United Kingdom and Colonies from all people born in Ghana or whose fathers or paternal grandfathers were born there, provided that they have no connection with the United Kingdom and Colonies either by birth, naturalisation, registration or descent, or, in the case of a woman, no connection by marriage. People who have such a connection with the United Kingdom and Colonies will retain their dual citizenship in Ghana and for as long as they remain there. . . . The Clause does not apply to British-protected persons who come from those parts of Ghana which were formerly known as the Northern Territories and the Togoland Trust Territory. Their position is covered by the Ghana Independence Act, in which it was provided that they should continue to enjoy the status of British-protected citizens until becoming citizens of Ghana. . . . Citizens of Ghana who lose their citizenship in the United Kingdom and Colonies will continue under our law to be, in the terms of the 1948 Act, British subjects or Commonwealth citizens, whichever they prefer to call themselves, and if they wish they can call themselves either or both. As such, they will be free to enter the United Kingdom, and while here to enjoy all our rights and privileges and accept our obligations as British subjects."

Clause 3 of the new legislation " is intended to enlarge the provisions of the 1948 Act, under which British subjects were able to become citizens of the United Kingdom and Colonies by registration. We are extending this provision to certain people who have ceased to be British subjects. Although Clause 3 contains only two substantive subsections, it applies to three separate types of case. Subsection (1) revives the opportunity granted by section 12 (6) of the 1948 Act to register for citizenship of the United Kingdom and Colonies. When that Act was passed, most other Commonwealth countries had not passed their citizenship laws. . . . It was intended at that time that the then existing British subjects whose British nationality would derive from their connection with those countries which had not then passed their citizenship laws should not become citizens of the United Kingdom and Colonies, unless they failed to acquire the separate citizenship of the country of which they appeared to be potential citizens. The 1948 Act, therefore, made a rough and ready definition of people who were potentially citizens of other Commonwealth countries. Such people were not included in the definition of citizens of the United Kingdom and Colonies, but were given a transitional status of British subject without citizenship. The idea was that they should have a common status, but that they would have no separate citizenship until their position had been clarified and their status resolved. It was hoped that with the passing of the various citizenship laws and particularly with the giving, under section 12 (6), of a year's grace from December 31 [1948], anyone who was in a doubtful position would have had it clarified. The way in which that was done was that anyone who would have become a citizen of the United Kingdom and Colonies but for his citizenship or potential citizenship of another Commonwealth country could apply to the Secretary of State for registration as a citizen of the United Kingdom and Colonies if he could prove three things. The first was that he was descended in the male line from someone born or naturalised in the United Kingdom or one of the Colonies. Secondly, that he intended to make his ordinary place of residence in the United Kingdom and Colonies. Thirdly, that it was evident that by reason of his close connection with the United Kingdom or Colonies he should become a citizen of them. . . . Experience has shown that the provision in the 1948 Act was too narrowly drawn. . . . It was too restrictive in three ways. In the first place, a year's grace was not long enough. People living in outlying districts of, for example, India and Pakistan, did not learn about the option which they were given until it was too late for them to collect evidence of their ancestry and submit an application within one year. Secondly, the option was not given to people descended from ancestors born in what is now the Irish Republic. . . . Thirdly, section 12 (6) did not cover people naturalised as British subjects outside the countries possessing separate citizenships. . . . We are therefore reviving that opportunity until December 31, 1962, and we are extending it to people whose ancestors came from the Irish Republic or were either themselves naturalised in a Commonwealth country before 1949 or are descended from such persons. That is the first type of case which, in the broadest way, can be described as people who, through no fault of their own, missed the opportunity of registration under the 1948 Act."

The second type of case dealt with in Clause 3 of the Bill arose as follows. "It was intended that nobody should lose their British nationality as a result of the 1948 Act. It was held that either a person would become a citizen of the United Kingdom or Colonies or of one of the other Commonwealth countries. Whilst it is true that nobody has lost his British nationality as a direct result of the Act, there are some . . . who have lost it as a result of the freedom of Commonwealth countries to legislate in any way they think fit, both as to citizenship of the Commonwealth or as to status generally." Such people may apply for registration and in their case there is no time limit. The third type of case covered by Clause 3 is dealt with in subsection (2), which refers to section 6 (1) of the 1948 Act, which was a provision entitling anyone who was a British subject in some other way to be registered as a citizen of the United Kingdom and Colonies, provided that he could prove that he was ordinarily resident here or in one of the Colonies and had been so for twelve months or such shorter period as the Secretary of State might accept or could prove that he was in Crown service. Registration will be similarly granted to him. . . . Cases have come to notice of people with a strong moral claim to be registered as citizens of the United Kingdom and Colonies, but who, under the present law, cannot qualify under either of the two heads mentioned. For example, a young man might be born in another Commonwealth country and come here to be educated; he might then get a job with a British firm in a foreign country. So long as he remained here, he might feel no particular need to acquire our citizenship, or he might have been under age and not entitled to do so, but on going abroad he might wish to strengthen his ties with the United Kingdom by acquiring our citizenship and yet he would be debarred from applying because he would no longer be resident here or in the service of the Crown. Therefore, subsection (2) will enable people in that sort of position to apply for registration as citizens of the United Kingdom and Colonies. They will have to satisfy the Home Secretary that they should be registered because of their close connection with the United Kingdom and Colonies. . . . . Here, again, no time limit is necessary. Clause 4 is a purely technical Clause, but it is desirable . . . to give legislative effect to a growing administrative practice. Under section 29 of the 1948 Act, our consular officers in foreign countries have power to register births and deaths of British subjects. In Commonwealth countries, some of our High Commissioners have been similarly authorised to keep registers of births and deaths, but they have acted on administrative instructions. They have kept the registers, which are accurate, and have been able to give their certificates as to what they have entered in the registers." However, legislation was needed "so that British subjects belonging to the United Kingdom—or any other British subjects—who come to live here can conveniently get a birth or death certificate for himself or his family from copies kept at Somerset House . . . needs to act on statutory instructions, and Clause 4 will give statutory recognition not only to registers kept by the High Commissioners in future, but to those which they have kept up to now in the way . . . described. It will make certified copies of these registers valid evidence in this country of birth and death" (Commonwealth Survey, C.O.I., April 15, 1958).

Bahamas

Constitution. The Secretary of State for the Colonies issued a statement on leaving the Bahamas. He said: ". . . I have been much impressed by the recent widespread development which has brought so much prosperity and employment to the people of the Bahamas. All who have worked so hard to secure this deserve the greatest credit. It is vital to the future of the colony that this development should not be prejudiced. But great developments bring great problems and responsibilities, calling for adjustments to meet modern conditions.

Both the Governor and I have been much concerned at recent happenings in the Bahamas, as have, of course, all who live here. For some time it had been apparent to both of us that changes, particularly in the field of labour relations and the franchise, were necessary, and we had been in correspondence about these. The Governor would, some time ago, have sought the concurrence of the Executive Council to the initiation of changes in these fields. Since, however, I have constitutional responsibilities and a wider choice of action open to me, I decided to come here and asked the Governor to refrain from action pending my visit.

Since I came here, I have seen a large number of people and as much of the colony as possible in the time available.

His Excellency and I have concluded that the following immediate steps should be taken:

1. The most pressing need is for the early enactment of labour legislation consistent with the needs of the Bahamas and in a form which commends itself to modern opinion. This should provide for the early establishment of a Labour Department under an experienced officer appointed by the Governor to the public service in the usual way. Consultations are now taking place concerning the form of this legislation, and to assist in these, Mr. Foggon, my chief Labour Adviser, will arrive in the colony this week.
2. Another essential change concerns the franchise:
   (*a*) There should be universal adult male suffrage. Representations have been made to me about votes for women. The Governor and I are, however, not convinced that at the moment there is a sufficiently widespread demand for this change.
   (*b*) The company vote should be abolished.
   (*c*) The present situation under which it is possible for one voter to have a vote in every constituency should be brought to an end. The plural vote should be limited to two, the second vote requiring a property qualification in another constituency.
3. The constituencies should be brought more into line with the movement of population within the colony. This should be done by creating four additional seats for New Providence, to be allocated in accordance with the distribution of voters. By-elections to these four seats should be held as soon as the necessary arrangements, including the preparation of a new register of voters, can be made.

Legislation to bring about these changes needs to be brought into effect by the end of this year.

In the discussions which the Governor and I have had, various views were naturally expressed, but, in consequence of these talks, His Excellency and I feel entitled to believe that these measures are likely to command widespread support, and will help to bring about that settled atmosphere which is essential for economic progress" (586 H.C. Deb. 344–5, April 17, 1958; see also 208 H.L. Deb. 1175–7, May 1, 1958).

British Honduras

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Ceylon

Constitution. On February 18, 1958, the Ceylon Senate passed a resolution appointing Senators to serve on the joint select committee of both Houses of Parliament to consider the revision of the Ceylon constitution. Earlier, the House of Representatives had chosen members to serve on the same committee, which now includes the Prime Minister, the Leader of the Opposition, and the Minister of Justice.

The committee will consider the revision of the Ceylon (Constitution and Independence) Orders in Council 1946 and 1947 with reference to the following matters and any others which the committee may consider necessary:

1. The establishment of a Republic.
2. The guaranteeing of fundamental rights.
3. The position of the Senate and Appointed Members of the House of Representatives.
4. The Public Service and the Judicial Service Commissions.

(Commonwealth Survey, C.O.I., April 1, 1958).

Christmas Island

The Christmas Island Act, 1958 (6 & 7 Eliz. 2, c. 25), received the Royal Assent on May 14, 1958.

The Act states in its preamble that its enactment has been requested and consented to by the Commonwealth of Australia. This is required by the Statute of Westminster, 1931, and was done in the Christmas Island (Request and Consent) Act, 1957 (No. 102 of 1957). It further provides for the placing of Christmas Island under the authority of the Commonwealth of Australia and for the transfer to Australia " of property, rights, powers, obligations or liabilities" held by Her Majesty in right of Her Government in the United Kingdom, Singapore or Christmas Island (subject to certain minor exceptions) and for any necessary ancillary provisions.

The transfer will take place by Order in Council under the Act, to be followed by a further Australian federal statute accepting the transfer. Thereafter, the island will be governed in accordance with section 122 of the Australian constitution, which applies to territories placed under the authority of and accepted by the Commonwealth of Australia. (See also Commonwealth Survey, C.O.I., May 27, 1958 and p. 99 above.)

Cyprus

Constitution. On June 19, 1958, the Prime Minister made a statement of policy. He said: "The policy of Her Majesty's Government in Cyprus has had four main purposes:

(*a*) to serve the best interests of all the people of the island;

(*b*) to achieve a permanent settlement acceptable to the two communities in the island and to the Greek and Turkish Governments;

(*c*) to safeguard the British bases and installations in the island, which are necessary to enable the United Kingdom to carry out her international obligations;

(*d*) to strengthen peace and security and co-operation between the United Kingdom and her allies, in a vital area.

These are the aims which Her Majesty's Government have consistently pursued, and which have guided their efforts in recent months to find common ground on which an agreed settlement might be reached. It is deeply regretted that all attempts in this direction have hitherto proved unsuccessful.

In view of the disagreement between the Greek and Turkish Governments and between the two communities in Cyprus, and of the disastrous consequences for all concerned if violence and conflict continue, an obligation rests with the United Kingdom Government, as the sovereign Power responsible for the administration of the island and the wellbeing of its inhabitants, to give a firm and clear lead out of the present deadlock. They accordingly declare a new policy which represents an adventure in partnership—partnership between the communities in the island, and also between the Governments of the United Kingdom, Greece and Turkey.

The following is an outline of the partnership plan:

Cyprus should enjoy the advantages of association not only with the United Kingdom, and, therefore, with the British Commonwealth, but also with Greece and Turkey.

Since the three Governments of the United Kingdom, Greece and Turkey all have an interest in Cyprus, Her Majesty's Government will welcome the co-operation and participation of the two other Governments in a joint effort to achieve the peace, progress and prosperity of the island.

The Greek and Turkish Governments will each be invited to appoint a representative to co-operate with the Governor in carrying out this policy.

The island will have a system of representative government with each community exercising autonomy in its own communal affairs.

In order to satisfy the desire of the Greek and Turkish Cypriots to be recognised as Greeks and Turks, Her Majesty's Government will welcome an arrangement which gives them Greek or Turkish nationality, while enabling them to retain British nationality.

To allow time for the new principle of partnership to be fully worked out and brought into operation under this plan in the necessary atmosphere of stability, the international status of the island will remain unchanged for seven years.

A system of representative government and communal autonomy will be worked out by consultation with representatives of the two communities and with the representatives of the Greek and Turkish Governments.

The essential provisions of the new constitution will be:

(*a*) There will be a separate House of Representatives for each of the two communities, and these Houses will have final legislative authority in communal affairs.

(*b*) Authority for internal administration, other than communal affairs and internal security, will be undertaken by a Council presided over by the Governor and including the representatives of the Greek and Turkish Governments and six elected Ministers drawn from the Houses of Representatives, four being Greek Cypriots and two Turkish Cypriots.

(*c*) The Governor, acting after consultation with the representatives of the Greek and Turkish Governments, will have reserve powers to ensure that the interests of both communities are protected.

(*d*) External affairs, defence and internal security will be matters specifically reserved to the Governor acting after consultation with the representatives of the Greek and Turkish Governments.

(*e*) The representatives of the Greek and Turkish Governments will have the right to require any legislation which they consider to be discriminatory to be reserved for consideration by an impartial tribunal.

If the full benefits of this policy are to be realised, it is evident that violence must cease. Subject to this, Her Majesty's Government intend to take progressive steps to relax the Emergency Regulations and eventually to end the state of emergency. This process would include the return of those Cypriots at present excluded from the island under the Emergency Regulations.

A policy based on these principles and proposals will give the people of the island a specially favoured and protected status. Through representative institutions they will exercise authority in the management of the island's internal affairs, and each community will control its own communal affairs. While the people of the island enjoy these advantages, friendly relations and practical co-operation between the United Kingdom, Greece and Turkey will be maintained and strengthened as Cyprus becomes a symbol of co-operation instead of a cause of conflict between the three allied Governments.

Her Majesty's Government trust that this imaginative plan will be welcomed by all concerned in the spirit in which it is put forward, and for their part they will bend all efforts to ensuring its success. Indeed, if the Greek and Turkish Governments were willing to extend this experiment in partnership and co-operation, Her Majesty's Government would be prepared, at the appropriate time, to go further and, subject to the reservation to the United Kingdom of such bases and facilities as might be necessary for the discharge of her international obligations, to share the sovereignty of the island with their Greek and Turkish allies as their contribution to a lasting settlement."

The Prime Minister went on to say:

" I have myself sent a personal appeal to the Prime Ministers of Greece and Turkey asking them to approach this policy in a spirit of co-operation and moderation. I have given the House the main outlines of the plan. There are, of course, many details which will require to be filled in after discussion. We are, therefore, not asking for immediate acceptance of our policy in every particular. While I recognise that some initial reactions may be unfavourable, I believe that further consideration will lead to the recognition of the genuine merits of this policy.

Meanwhile, it is a great support to the Government in discharging their heavy responsibilities in this matter to have the goodwill and understanding of the North Atlantic Council. Its assistance in the process of conciliation is proving, and I feel sure will continue to prove, of the highest value. Finally, I trust that our efforts, which are constructive and fair, will commend themselves to the House and to the country." (589 H.C. Deb. 1321–1326; Cmnd. 455; see also 588 H.C. Deb. 899–901, May 19, 1958; 589 H.C. Deb. 899–904, June 17, 1958; 209 H.L. Deb. 1001–1002, June 17, 1958; 209 H.L. Deb. 1129–1137, June 19, 1958.)

On June 26, 1958, the House of Commons debated Cyprus in Committee of Supply (590 H.C. Deb. 615–735).

Dominica

Report. The Colonial Reports 1955 and 1956 have been published by the Colonial Office.

East Africa

Airways corporation. An Order in Council has been made increasing from five to six the number of the members (other than the chairman) of the East African Airways Corporation (S.I. 1958 No. 916).

Report. The Colonial Report, 1957, of the East Africa High Commission has been published by the Colonial Office.

See also **Kenya** (below).

Fiji

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Kenya

Constitution. An Order in Council has been made with new provisions for Kenya with respect to the Governor, the Council of Ministers, the Legislative Council and the Supreme Court, and establishing a new body for Kenya, called the Council of State, having, in particular, the function of drawing attention to Bills and subordinate instruments which, in the opinion of the Council, are disadvantageous to persons of any racial or religious community (S.I. 1958 No. 600).

Leeward Islands

Emergency powers for Antigua, Saint Christopher Nevis and Anguilla, Montserrat and the Virgin Islands. An Order in Council has been made providing: (1) The Governor may, during a period of emergency in any colony to which this Order applies, make such laws for that colony as appear to him to be necessary or expedient for securing the public safety, the defence of the colony or the maintenance of public order or for maintaining supplies and services essential to the life of the community.

(2) In subsection (1) of this section the expression " period of emergency " means, in relation to any colony referred to in that subsection, a period beginning with a declaration made by the Governor by Proclamation published in that colony that a public emergency exists therein and ending with a declaration so made that a public emergency no longer exists therein.

(3) For the avoidance of doubt, it is hereby declared that the Governor shall not, in the exercise of the powers conferred upon him by this section in relation to any colony, be obliged to consult with the Executive Council of that colony.

(4) In the exercise of the powers conferred upon him by this section any Deputy to the Governor appointed under article 5 of the Leeward Islands Letters Patent, 1956, shall conform to and observe all instructions that the Governor may from time to time address to him in that behalf:

Provided that the question whether or not any such Deputy has conformed to and observed any such instructions shall not be inquired into by any court (S.I. 1958 No. 591).

Report. The Colonial Report, 1955 and 1956, for St. Kitts, Nevis and Anguilla has been published by the Colonial Office.

Malaya

Appeals. On March 4, 1958, an agreement on the procedure for appeals from the Federation of Malaya to the Judicial Committee of the Privy Council was signed in Kuala Lumpur between Sir Geofroy Tory, the United Kingdom High Commissioner, on behalf of the Queen, and the Yang Di-Pertuan Agong (the head of State of the Federation). The agreement enters into force as soon as an Order of Her Majesty in Council and a law of the Federation for giving effect to it are both in operation.

Under the terms of the agreement, the Judicial Committee is enabled to entertain references made to it by the Yang Di-Pertuan Agong. Appeals will lie from the Supreme Court of the Federation of Malaya to the Yang Di-Pertuan Agong and will be referred by him to the Judicial Committee (*a*) in the case of any decision from which an appeal from the Supreme Court would have been entertained by Her Majesty in Council (with or without special leave) immediately before August 31, 1957; (*b*) in the case of any decision as to the effect of any provision of the constitution of the Federation.

In cases when leave of the Supreme Court has not been obtained, application may then be made for special leave to appeal to the Yang Di-Pertuan Agong, who shall then either grant or refuse permission in those cases as the Judicial Committee may recommend. In any case in which special leave is so granted, an appeal shall lie to the Yang Di-Pertuan Agong, and shall be referred by him to the Judicial Committee.

In order to avoid expense and delays, appeals and applications for leave to appeal shall be lodged in the Registry of the Judicial Committee.

Reports and recommendations of the Judicial Committee shall be sent by the Registrar of the Privy Council to one of Her Majesty's principal Secretaries of State for transmission to the Yang Di-Pertuan Agong.

On receipt of a report or recommendation of the Judicial Council, the Yang Di-Pertuan Agong shall make such order as may be necessary to give effect to it.

Copies of all orders made by the Yang Di-Pertuan Agong under this agreement shall be sent to one of Her Majesty's principal Secretaries of State for transmission to the Registrar of the Privy Council. (Commonwealth Survey, C.O.I., April 29, 1958.)

Malta

Constitution. On April 1, 1958, the House of Commons debated the statement of March 25 (see above pp. 194–197) (585 H.C. Deb. 1035–1162).

On April 24, the Ministers in Malta resigned. On May 8, the Secretary of State for the Colonies said:

"When Ministers resigned and the Assembly was dissolved, it was apparent that the Governor might, at any moment, require powers to enable him to carry on the administration of the islands. Hitherto, he had exercised certain powers as Governor-in-Council. With the resignation of Ministers it would be necessary to vest in himself certain powers previously vested in the Governor-in-Council or Maltese Ministers. In addition, the Governor advised me on April 30 that the threat to public safety and order could not be contained by the police without certain powers not conferred by existing Maltese law. Provision for emergency powers is contained in the Malta (Emergency Powers) Order in Council, 1953, made under section 59 of the Malta Constitution Letters Patent. In the light of the advice I received from the Governor, I gave him notice, under section 3 (1) of the 1953 Order in Council, that a public emergency existed. He issued a proclamation to that effect on April 30." (587 H.C. Deb. 1418.)

New Hebrides

Report. The Colonial Reports, 1955 and 1956, have been published by the Colonial Office.

Nigeria

Constitution. The Federal Government of Nigeria has made two Orders in Council to give effect to certain recommendations agreed upon at the London constitutional conference of 1957. These Orders came into effect on April 1, 1958, and provide for certain changes in the House of Chiefs in the Northern Region, and for the establishment of a Northern Council of Chiefs; for the creation of a Southern Cameroons House of Chiefs as a deliberative body, for the enlargement of the Southern Cameroons House of Assembly, for the appointment of a Prime Minister there, for the establishment of a Ministerial system, and for an unofficial majority in the Executive Council of the Southern Cameroons.

This follows the two Orders in Council of 1957 which changed the membership of the Executive Councils of the Eastern and Western Regions, reflecting their enhanced responsibilities on the attainment of self-government in 1957. The Northern Region is to ask for self-government in March 1959.

A Federal Prime Minister was appointed in August 1957 and consequential changes have been made in the membership of the Federal Council of Ministers.

In the Northern Region the membership of the House of Chiefs has been increased from 50 to 62, and now consists of all First Class Chiefs, 47 other chiefs selected from their own number under regulations made by the

Governor, and an adviser on Moslem law. The Council of Chiefs consists of the Governor, as president, not less than 2, or more than 4, chiefs who are members of the Executive Council, the Premier, and 4 other chiefs from among members of the House of Chiefs.

Membership of the Southern Cameroons House of Assembly has been increased and now consists of 32 members, 26 of whom are elected, 2 are special members, and 4, including the Commissioner, are *ex-officio* members. There is now a Prime Minister, and 4 other Ministers, all of whom are elected members appointed on the recommendation of the Prime Minister, who is himself appointed by the High Commissioner (the title now held by the Governor-General of the Federation in relation to his responsibilities for the trusteeship territory of the Cameroons).

There is now an unofficial majority in the Southern Cameroons Executive Council, which consists of the Commissioner as president, 3 *ex-officio* members, the Prime Minister, and 4 other Ministers.

Provision has also been made in these Orders for a Federal Police Service Commission, and for Public Service Commissions and Judicial Service Commissions, with executive functions, in the self-governing Eastern and Western Regions. (Commonwealth Survey, C.O.I., April 15, 1958.)

An Order in Council has been made enabling the Governor-General of the Federation of Nigeria to make provision for the election of members to a new House of Representatives that it is proposed should hereafter be established for the Federation of Nigeria in accordance with the recommendations of the Nigeria Constitutional Conference held in London in May and June 1957 and permits registration of voters to take place and other preliminary measures to be taken in pursuance of any such provision. (S.I. 1958 No. 915.)

Guarantee. The Treasury has issued a statement of guarantee on a loan to be made to the Federation of Nigeria by the International Bank for Reconstruction and Development (H.C. 212 of 1957–58).

Public service. The Annual Report for 1957 of the Nigerianisation Officer of the Federal Government of Nigeria (Government Printer, Lagos, 1958), describes the work of the new Nigerianisation Office during the first ten months of its existence. The department was established in March 1957, following the acceptance by the Federal House of Representatives of a White Paper on Federal Government policy for the Nigerianisation of its public service and the higher training of Nigerians for responsible posts in that service (Government Printer, Lagos, 1956). The report carries a foreword by the Prime Minister of the Federation, Alhaji Abubakar Balewa, who writes that the department has " kept a vigilant eye on overseas recruitment to ensure . . . that no overseas officer is recruited for a post which can be satisfactorily filled by a Nigerian," but that " the Federal Government's prime consideration must be the maintenance of the standards of the public service." He also states that the clear picture of the progress of Nigerianisation given by the report's statistics should prove invaluable to those interested in the problem of self-government for Nigeria in 1960.

The functions of the Nigerianisation Officer include (1) maintaining continuous contacts with ministries and heads of Federal departments regarding " in-service " training and their requirements for trained staff, (2) advising the Public Service Commission, in consultation with Nigerian Students Officers overseas, on the availability of trained Nigerians for vacant posts, and (3) providing the Ministry of Social Service with the information needed if educational awards are to be made to the best advantage of Nigeria, and in determining the number of school leavers required annually to build up and maintain the Nigerianised public service. (Commonwealth Survey, C.O.I., June 24, 1958.)

Report. The Colonial Report, 1954, has been published by the Colonial Office.

Rhodesia and Nyasaland

Northern Rhodesia. A White Paper (Proposals for Constitutional Change in Northern Rhodesia, The Government Printer, Lusaka), published by the Northern Rhodesia Government, and presented to the Legislative Council on March 28, outlines proposals for constitutional advance in the territory, drawn up after a series of discussions, held by the Governor in 1957, with members of the Legislative Council and with other leaders of political organisations.

The proposals include a widening of the franchise, to permit, for the first time, African members to be returned to the Legislative Council by direct election from constituencies; an increase in the total membership and in the proportion of elected members of the Legislative Council; and the reconstitution of the Executive Council to provide for a majority of unofficial Ministers, at least one of whom must be an African. (Commonwealth Survey, C.O.I., April 15, 1958.)

Nyasaland. The Secretary of State published an agreed record of a meeting he had with the Nyasaland African Congress delegation who urged constitutional amendment (590 H.C. Deb. 243–244, June 24, 1958).

Seychelles

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Sierra Leone

Constitution. On January 15, 1958, the Government of Sierra Leone published a White Paper proposing constitutional changes further to those of 1956.

The proposals, which include changes in the composition of the Executive Council, the appointment of a Prime Minister and other Ministers, and of a Deputy Governor, have been approved in principle by the House of Representatives. They will come into effect when the United Kingdom Government has made the necessary changes in the constitutional instruments of Sierra Leone.

The constitutional advances of 1956 increased the Legislative Council, then renamed the House of Representatives, from 31 members to 57 members. Only 7 of the former Legislative Council members had been elected, and those were from the Colony only. Thirty-nine members of the new House of Representatives were elected (14 from the Colony, 24 from the Protectorate, and 1 from Bo urban area), on a franchise extended to all adult taxpayers. Of the remaining members, 12 were permanent chiefs selected by the 12 Protectorate district councils, 2 were nominated to represent special interests, and 4 were *ex-officio* members, namely, the Chief Secretary, the Attorney-General, the Financial Secretary, and the Chief Commissioner of the Protectorate.

These 4 *ex-officio* members are no longer to be members of the Executive Council, which is now to consist of the Governor, as president, the Prime Minister, and 7 other Ministers, appointed by the Governor on the recommendation of the Prime Minister, and chosen from among the elected members of the House of Representatives.

The Governor will consult the Executive Council and act on its advice, subject to safeguarding his ultimate responsibility for the preservation of peace and good government. The Governor's reserved executive and legislative powers will be redefined in the constitutional instruments. But he will retain responsibility for external affairs, defence, internal security, police, and the public service.

The posts of Chief Secretary and Chief Commissioner have been abolished. The functions of the Chief Secretary, other than those relating to subjects reserved to the Governor, are to be allocated to appropriate Ministries. Alternative administrative arrangements are to be made for the functions of the Chief Commissioner.

The Attorney-General will continue to act as legal adviser to the Government, with a seat in the House of Representatives but no voting rights. The Financial Secretary continues to be the principal financial adviser of the Government, but his executive functions are to be allocated to a Ministry of Finance (Commonwealth Survey, C.O.I., April 15, 1958).

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Singapore

Constitution. On May 27, 1958, discussions were concluded in London between representatives of the United Kingdom Government and an all-party delegation from Singapore on the terms of the Order in Council required to give effect to the decisions of the Singapore Constitutional Conference of March and April, 1957. The talks began on May 12 on the basis of a draft which had been sent in advance to the Singapore Government but had not at that stage received the formal endorsement of the British Government.

At the commencement of the discussions, the Singapore delegation emphasised the necessity of checking the draft against the terms of the report of the 1957 conference which stated, *inter alia,* " that the constitution should be designed to confer on Singapore full internal self-government." In reply, the United Kingdom delegation explained that the draft had been based on the findings of the 1957 conference and that they had no intention of departing from the decisions then taken.

As a result of the discussions, the substance of the provisions of the new constitutional instrument has been agreed and a Bill creating the State of Singapore and enabling the Queen to make an Order in Council is to be introduced into the United Kingdom Parliament shortly. Meanwhile, the legal draftsmen of the Singapore Government and of the United Kingdom Government will now finalise and refine the draft so as to state accurately the points already agreed (Commonwealth Survey, C.O.I., June 10, 1958).

Tanganyika

Legislative Council. An Order in Council has been made deleting from the Tanganyika (Legislative Council) Order in Council, 1926, the general provision which disqualifies for appointment or election as a Representative Member of the Legislative Council persons who hold office of emolument under the Crown and, instead, to confer on the legislature of Tanganyika a power to prescribe by law what offices or appointments or classes of office or appointment shall so disqualify (S.I. 1958 No. 592).

Uganda

Constitution. On May 23, 1958, the House of Commons debated the position in Uganda (588 H.C. Deb. 1726–43).

Report. The Colonial Report, 1957, has been published by the Colonial Office.

West Indies

Capital site. The report of the Joint Commission (Report of the Chaguaramas Joint Commission, Colonial No. 338, H.M.S.O.) set up to investigate all aspects of the British West Indies' request to make available, as the site for the federal capital, the United States naval base at Chaguaramas, the north-west peninsula of Trinidad, was published on May 15, 1958. Its findings were unanimous. Separate statements endorsing the Commission's findings were issued simultaneously with the report by the Governments of the United Kingdom and of the United States. The Federal Government has since announced that it regrets that it cannot accept the views expressed in these statements.

The Joint Commission was set up following talks in London in July, 1957, between representatives of the United Kingdom and United States Governments and of the West Indies Standing Federation Committee. It was composed of technical experts drawn from all the countries concerned, under the chairmanship of Sir Charles Arden-Clarke, formerly Governor-General of Ghana.

In interpreting its mandate "to investigate all aspects of the British West Indies' request to make Chaguaramas available, taking into full account military and economic considerations," the Commission bore in mind the unanimous decision of the London conference that there is a need for a United States naval base in the Eastern Caribbean, and the enactment in the federal constitution that the seat of the Federal Government should be in Trinidad. The Commission considered that the question of alternative sites for the capital within Trinidad was a matter for the Federal Government, and did not attempt to investigate or deal with this question.

The Commission concluded that: "Strategically, the naval base in the Eastern Caribbean should be on the Gulf of Paria [a land-locked gulf with 3,100 square miles of sheltered calm waters between the west coast of Trinidad and the Venezuelan mainland]; the site selected for such a base must be capable of conforming to the military requirements; and the present base at Chaguaramas fulfils the strategic and military requirements for a naval base in the Eastern Caribbean."

Three sub-committees were appointed to investigate possible alternative sites for the naval base, but the Commission concluded that the only alternative sites in the West Indies which fulfilled the strategic requirements and could be made to conform to the military requirements were on the west coast of Trinidad, on the Gulf of Paria, and that the cost of development to provide what exists at Chaguaramas today on these sites would vary from approximately £47 million to £88½ million. The time required to develop these facilities would vary from five-and-a-half to ten years.

The United States and United Kingdom naval representatives agreed that, if the Governments concerned agreed in principle to move the base, and if the necessary funds were made available, from military considerations Irois Bay would be the preferable choice of the alternative sites. But in their opinion Chaguaramas was the most suitable site for a naval base on the Gulf of Paria.

The Commission made a detailed investigation of what, if any, portion of the present base was not essential to its continued functioning and could be released, and concluded that there was no significant portion of usable area which was not essential to the base's mission, that the release of any portion of it as a prelude to its ultimate total release was impracticable and that partition of the base was also impracticable.

The United Kingdom statement issued with the report says :" Although the United States Government is legally entitled to retain the use of the base area until 2040, Her Majesty's Government would have been prepared to consider inviting them voluntarily to surrender their rights as an act of generosity if the Joint Commission had reported that all or part of the base could be given up without adversely affecting defence, or that the necessary facilities could be replaced at any reasonable cost without loss of strategic efficiency. But the Commission have found unanimously otherwise.

In view of their report, and bearing in mind the overriding importance of the base to the defence of the Western Hemisphere, which is also of vital concern to the West Indies, Her Majesty's Government could not reasonably ask the United States Government either to relinquish part of the base or to meet the very considerable cost of moving the whole of it to a less satisfactory site. Nor could Her Majesty's Government entertain the possibility of themselves contributing towards the cost of such an operation.

Her Majesty's Government realise that the Commission's findings will cause disappointment, but they hope that the Governments of The West Indies and of Trinidad will recognise that they make Her Majesty's Government's decision inevitable."

The United States official statement concludes: "The United States Government believes that these conclusions should settle the Chaguaramas question so that the countries concerned can proceed without hindrance to develop their relationships in a constructive manner."

A statement issued on June 3 by the Federal Government of the West Indies concludes:

"The Federal Government is well aware of the United States of America's contention that military necessity makes it imperative that the base should exist in the eastern Caribbean, and so long as the present state of world tension exists refrains from a decision which, at this stage, might make defence of the western world more difficult.

"It cannot, however, agree that at this time a final decision should be taken which accepts the perpetuation of a lease for 99 years even though during that time present world tensions may disappear.

"It regrets, therefore, that it cannot accept the views expressed by the United Kingdom and United States of America, views, moreover, taken without the calling together of a conference of the parties, and will request the early summoning of such a conference.

"Meanwhile the Federal Government has decided to remain in its temporary headquarters provided by the Government of Trinidad and Tobago, until the matter at issue has been settled."

The Trinidad and Tobago Legislative Council has endorsed without a division the Federal Government's request for an early conference (Commonwealth Survey, C.O.I., June 10, 1958).

Zanzibar

On May 9, 1958, the House of Commons debated Zanzibar on the adjournment (587 H.C. Deb. 1675–86).

BOOK REVIEWS

The Council of Europe. By A. H. Robertson. [London: Stevens. 1956. 252 pp. 42s.]

It has been said that perhaps the inevitable result of living on an island is that one becomes insular: much that occurs in Europe is regarded by many as being what " they " are doing, with the added disadvantage that they are doing most of it in French or German. Dr. Robertson's book on the Council of Europe, therefore, comes as the answer to those who want to know just enough to get on with, but not too much to get bored.

It is easy for anyone to buy a copy of a Treaty and return six months later with a textual analysis and a host of speculations. Dr. Robertson, however, who is an official of the Council of Europe and who has worked in Strasbourg and seen the Council grow, does far otherwise. Indeed, much of the value of this book is that, although the author is himself a lawyer, he regards the Council of Europe not solely in legal terms, but in its setting in time. " The increasing frequency," he writes, " during the nineteenth century of the need for multilateral negotiations provided ever more international conferences which are nothing more than a device to adopt the diplomatic method to the need for multilateral negotiation. When the number of problems to be treated in this way increases beyond a certain point there is need for such representation to become permanent and the result is a standing conference. When the standing conference is served by a secretariat, it becomes an international organisation."

After two brief introductory chapters, the author analyses in more detail the actual provisions of the Statutes of the Council and shows how many of these reached their present wording, and what effect has been given to them.

When discussing the Consultative Assembly, he takes us carefully and swiftly through its early years and shows how at first it sought to possess limited functions but real powers. Then, how the early idealism faded into rivalry between those, like France, Italy and the Benelux, who wanted some sort of federal authority, and Britain, Ireland and Scandinavia, who looked merely for co-operation and who clung to their national sovereignties. He then shows how this stage was ended, mainly as a result of the success of the Coal and Steel Community, and he describes the plan of Sir Anthony Eden that the organs of the Coal and Steel and Defence Communities should be united with those of the Council of Europe. Finally, he shows how this idea gave place to the present one, namely, that the Council should be regarded as " the general framework of European policy " and that it should gradually obtain parliamentary control.

Of this development he writes: " There would seem to be three possible stages towards parliamentary control: first, the right of review, that is to say of 'keeping an eye on' and expressing opinions about the work of other organisations: secondly, the role of supervision and co-ordination, and thirdly, of actual control. The first stage has been reached: perhaps some progress has been made towards the second; the third has certainly not been reached."

However, Dr. Robertson goes on to stress that as a forum of debate on major topics, such as the debate in 1953 before the Four Power Conference in Berlin, and that on the status of the Saar, the Assembly has found its true function for the present time.

The author turns next to consider the activity of the Council in the economic sphere, and he traces how, here again, ideas as to the task of the Council rapidly changed. At first there were proposals to alleviate the economic crisis of 1949, then schemes to create new agencies for agriculture and transport, then steps towards creating freedom of trade and the development of Africa were discussed, but finally the Council adopted a paternal role of reviewing and guiding.

The European Conventions signed, and in some cases already ratified, are then briefly considered, particularly those dealing with Social Security, Refugees and with Cultural Problems such as the exchange of books, scientific research and admission to universities. One may here regret, however, that although the Statute is set out in an appendix, the text of these conventions has not been included, so that even the inquisitive are left with only a bare summary of them.

Naturally as a lawyer, Dr. Robertson is quick to grasp the utmost importance of the Convention on Human Rights, that is already in force, and of the legal machinery set up to carry out its provisions. These contain, as he states, two major departures from the traditional concepts of international law. " First, that one party may cite another before the Commission not only on behalf of the plaintiffs' nationals but also on behalf of any other person within the jurisdiction of the defendant, even if the injured person is one of the latter's own nationals. Equally remarkable is the fact that practically for the first time in history, the individual is recognised by international law as having the right of direct access to an international instance before which he can bring his case against a government, which may be that of a foreign power or equally that of a State to which he himself owes allegiance."

After considering certain legal and administrative matters, the author outlines the relationship existing between the Council of Europe and such bodies as the United Nations, N.A.T.O., G.A.T.T., the Coal and Steel Community, O.E.E.C., and the rest of the post-war proliferations.

This book has condensed a long story into a short space, but the author in that space has shown what he stated in the Preface was to be shown—" that there is an interesting story to be told."

D. G. VALENTINE.

FEDERALISM AND CONSTITUTIONAL CHANGE. By PROFESSOR WILLIAM S. LIVINGSTON. [Clarendon Press. Oxford University Press. 1956. 317 and (Appendices) 14, and (Bibliography and Index) 47. 42s.]

THE terms of his title have received somewhat different interpretations from Professor Livingston. Federalism is broadly interpreted: as the author emphasises, it is in any case not an exact term. States conform no better to rigid classifications than do their citizens, and thus within the author's wide definition of a federal State the United Kingdom, New Zealand, and South Africa find a place as well as the well-known federations. On the other hand " constitutional change " is more narrowly interpreted. On the whole the concentration is on formal methods of alteration, and the less formal are not given the same weight. They are mentioned but there is little assessment of their relative practical utility as methods of constitutional adjustment to changing conditions and opinions.

In the case of the major federation the book deals faithfully with diverse problems. In Canada the concern is with Dominion-provincial relationships, having particular regard to their effect on the position of the United Kingdom and to theories on the nature of the Canadian Constitution. Here the discussion of the British North America (No. 2) Act, 1949, is particularly useful. In Australia the internal operation of the amending process is clearly set out. It may, though, be doubted, in the light of the remarks of Latham C.J. in *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 573, if the power of delegation to the Commonwealth Government is as extensive as is here suggested. The chapter on Switzerland is equally clear yet less satisfactory. In part this is no doubt due to the character of many of the " constitutional " amendments there, and to the uses to which the amending process has been put. In both cases there are often such great differences from the other federations that the chapter of necessity seems to stand apart from the book. As might be expected the discussion of procedures in the U.S.A. is probably the best and most exhaustive, and to the outsider gives a good picture of the history of constitutional amendment there and of the influences which work upon the process. The consideration of other countries is again less happy. At times the concern is too much with finding federal elements, as with the United Kingdom, or, at others, matters are attributed to federation which may, as in South Africa, be really matters of straight politics without any particular federal implications.

This is perhaps merely a consequence of the difficulties of the author's theme. By title it is not a straight book on constitutional amendment, and striking a balance between, or relating, the two elements of the title was not easy. In its broader aspect the reader is sometimes disturbed by some generalisations. Is the respect for written law, or for the courts, so much less in Britain than elsewhere on account of the absence of a written constitution and judicial review? The assertion that " What the judiciary seems to do in America and in other countries where it has the power of judicial review is not to *amend* the constitution but to prevent its violation " in effect substitutes one uncertainty for another. Such distractions are unfortunate for as an account of the amending process the book has great merits. There is a wealth of detail supported by tables which are both informative and helpful. As such the book does give a useful insight into the working of diverse but related constitutions.

J. D. B. MITCHELL.

PRINCIPLES OF ADMINISTRATIVE LAW. Second Edition. By J. A. G. GRIFFITH, LL.M., and H. STREET, LL.M., PH.D. [London: Sir Isaac Pitman & Sons Ltd. 1957. xxxvii and 324 pp. 40s. net.]

THIS book has made a name for itself by its excellence and not merely because it is without a competitor; no doubt the first factor is the main reason for the latter. In the new edition the authors have brought it up to April, 1957, that is to say a date which allowed them to mention, on pp. 198–199, the appointment and progress of the Franks Committee but not to deal with its report. There are many alterations in detail, most of them in the last three chapters, dealing respectively with the Control of the Administrative and Judicial Powers of the Administration, Suits against the Administration, and Public Corporations. It says much for the foresight of the authors that they have hardly ever been forced to change their minds since they signed the preface to their first edition in September, 1951. The style and size of the book remain the same and the only criticism I feel tempted to make is in the form of a hope that the authors will in their next edition relieve the perhaps excessive austerity of their treatment by diluting and diversifying it through the use of more illustrations and fuller argument. Students often find this subject difficult because they have no experience of the tasks confronting the practical administrator. Once those are known and understood, what at first sight appear to be very difficult cases often become plain sailing.

If only practitioners would study the book we might have fewer unfortunate decisions.

F. H. LAWSON.

NATIONALISATION—A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW. By ISI FOIGHEL. [Copenhagen: Nyt Nordisk Forlag Arnold Busck and London: Stevens & Sons Ltd. 1957. 136 pp. 28s. 6d.]

THE author of this very interesting little book concludes from a survey of practice that the nationalisation of foreign property is not contrary to international law unless the property in question is State property "used in official government service," or the nationalisation is in breach of a treaty, or is formally—and not merely factually—discriminating. On the question whether the effecting of nationalisation involves an obligation to pay compensation in respect of foreign property he finds something of a divergence between theory and practice and he offers a most valuable survey of the treaties which have regulated the matter. It may be suggested that the author's arguments will in the main be accepted by the majority of students of the whole question. There may be disagreement in detail—especially in relation to terminology, and also on the question whether a treaty can really inhibit nationalisation. But the book, which is in fact a reprint of a monograph in the *Acta Scandinavica,* is to be welcomed as a clear and succinct account, expressed in adequate English.

CLIVE PARRY.

CASES ON THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA. Second Edition. Selected and annotated by GEOFFREY SAWER, B.A., LL.M., of the Victorian Bar, Professor of Law in the Australian National University. [Sydney: The Law Book of Australia Pty., Ltd. 1957. xxxi and 629 pp. 70s.]

A COUNTRY with a written constitution (especially if it is federal) and judicial review must be a paradise for constitutional lawyers. Why has no comparable selection of cases yet emerged from Canada? Perhaps it is because the Privy Council was until recently the final court of appeal from Canada and its decisions will be readily found in the *Law Reports,* whereas about 85 per cent. of the leading cases on the Australian Constitution have been settled by the High Court of Australia whose reports are not so generally accessible. However that may be, Professor Sawer did us a service in bringing out his *Cases* in 1948 at the suggestion of the Australian Universities Law Schools Association. The new edition has been prepared in the course of his research programme at the Australian National University—happy Australia to have State-assisted legal research! He tells us that in selection he has relied heavily on the advice of his colleagues, and the book is entitled to all the greater respect on that account. Since 1948 a new and enlarged edition of *Wynes* and the two editions of *Nicholas* have appeared. Professor Sawer therefore supplies references to these books and, without duplicating the work of the text-writers, he has changed the form of the notes so as to provide a critical analysis of the various reasonings of the majority and the opinions of the dissentient judges. Hypothetical cases are also canvassed.

The new edition is appreciably larger than the first, and finds room for four more cases. On the 58 decisions included, 50 are by the High Court. The new cases include the *Communist Party, Bank Nationalisation, Capital Issues, Nelungaloo, Foster, Hughes & Vale Pty., Kelly, Hides and Leather, Noarlunga,* and the *Boilermakers* (now reported in [1957] A.C. 288). The method of arrangement is not emphasised, but there is a useful Table of page references to sections of the Constitution Act. Wisely, no attempt is made to frame "headnotes," but the points involved are briefly indicated. The manner in which the litigation arose usually appears in the leading judgment; otherwise it is summarised. At least one judgment in each case is set out more or less in full, with omissions indicated. Sometimes, too, shorter extracts from other judgments are added. All the cases are concerned with the validity of Commonwealth legislation or delegated legislation under the Constitution or the consistency of State laws with Commonwealth laws, except three or four which turn on the interpretation of the Commonwealth Arbitration and Conciliation Act and one which deals with the writ of prohibition. This will seem very strange to the English law student, who would feel more at home with cases such as the recent one on Parliamentary privilege (*R.* v. *Richards, ex p. Fitzpatrick and Browne*), which does not fall within the scheme of the book. An American law student would recognise some vaguely familiar landmarks, but would miss cases on fundamental rights and liberties.

As was to be expected, the new edition has been prepared with great thoroughness, based on deep learning and wide experience. No one, whether student or teacher, who wishes to acquire more than a superficial knowledge of the Australian Constitution as it has been interpreted by the courts, would attempt to do without Sawer's *Cases*.

O. HOOD PHILLIPS.

CONSTITUTIONAL LAW (2nd ed.) and LEADING CASES IN CONSTITUTIONAL LAW (2nd ed.). By O. HOOD PHILLIPS. [London: Sweet & Maxwell, Ltd. 1957. xxxix and 835 pp., and xix and 465 pp. 45s. and 38s. 6d.]

THE excellent new edition of Professor Hood Phillips' *Constitutional Law* is certain to enhance the high reputation of this work. The general character of the book has altered little. The main changes from the first edition are as follows. Chapter 26, on the Church of England, has been expunged. Chapter 30, on Rights and Duties of the Citizen—General Principles, has been absorbed in the course of rearrangement. The chapters constituting Part II, on The Crown; Central and Local Government, have been regrouped and divided into two parts, on The Crown and the Central Government, and Administrative Law. New chapters on Ghana and Malaya have been added. An Appendix deals with the report of the Franks Committee. A number of chapters, notably that on Parliamentary Sovereignty, has been rewritten wholly or in part. Many footnotes have been expanded and now contain a wealth of references to learned monographs and articles: much Commonwealth material, and many works which are not of a strictly legal nature, are included. The detailed work of revising the book has been undertaken with meticulous care. A particularly praiseworthy feature of the new edition is that it is only nine pages longer than its predecessor and yet ignores no recent developments of importance. The text remains clear and eminently readable even when it deals with the more intractable parts of the subject. This edition will be most useful to students and teachers of constitutional law.

It is with reluctance that one turns to the reviewer's unpleasant task of cataloguing minor flaws. One does so without any wish of disparaging the great merits of this book, but in the hope that the learned author may find some of the following suggestions of use in preparing the next edition. (1) The proposition that " Unwritten constitutions are *necessarily* flexible " (p. 6, reviewer's italics) is not so self-evident that it can simply be asserted. There was a time when the English Constitution was as unwritten as it is today, but the power of Parliament to legislate on certain matters affecting the Royal Prerogative was judicially doubted; and Professor Hood Phillips himself rightly or wrongly regards the Sovereignty of Parliament as the " one fundamental law " of the English Constitution today (pp. 22, 44). (2) The statement that limitations on legislative authority which cannot be enforced by the courts are not legal but only conventional (p. 7) is difficult to reconcile with the statement that statutes imposing duties which cannot be enforced by the courts are nonetheless laws (p. 2). (3) The account of the *Eton College Case* (1815) P.Wms. 53 (at p. 39) might easily lead the reader to suppose that the dispensation in that case was granted after the Bill of Rights, 1688: in fact it was granted in 1566. (4) At p. 198 it is said that many persons who were British subjects under 4 & 5 Anne c. 16 as interpreted in *Att.-Gen.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436 " fought against this country in the First or Second World Wars and thereby presumably committed treason." Might they not escape hanging on the principle of *R.* v. *Ahlers* (1914) 11 Cr.App.R. 63? (5) While it is true as a matter of fact that the appointment of a civil servant "lasts during good behaviour" (p. 267), many students will find this difficult to reconcile with the statement at p. 269 that civil servants "hold office . . . at the pleasure of the Crown." (6) There is a slip at p. 776 where habeas corpus and certiorari are enumerated among "remedies which by English law are not available against the Crown." (7) Considering the size and scope of the book, it is remarkable how little relevant material has been overlooked. A few candidates for future inclusion are: Dicey's article in 17 L.Q.R. 302, on the effect of the growth of discretionary powers on the Rule of Law (at or about p. 31); *R.* v. *Camborne JJ.* [1955] 1 Q.B. 41, on the rule that a man shall not be judge in his own cause (pp. 411–413); *Adams* v. *War Office* [1955] 1 W.L.R. 1116, on the interpretation of section 10 of the Crown Proceedings Act, 1947; *The State* v. *Kingston* [1937] I.R. 699, on successive applications for habeas corpus (p. 505; Mr. Heuston's learned discussion of the case in 66 L.Q.R. 79 is cited, but not the case itself); *Egan* v. *Macready* [1921] 1 I.R. 280, on the powers of the courts during a state of martial law (at or about p. 548); some reference to Legal Aid might have been made in the chapter on the Judicial System. (8) A few cases and statutes, though cited in some parts of the book, are omitted in other parts where they appear to be relevant: thus there is no reference to section 10 of the Crown Proceedings Act in the discussion of the civil liability of soldiers to each other (p. 313); none to *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482, in the discussion of service contracts with the Crown (p. 432 would be an appropriate niche); and none to *Healey* v. *Minister of Health* [1954] 2 Q.B. 221, in the discussion of the scope of the action for a declaration (p. 454; this case is somewhat misleadingly cited at p. 442 so as to give the impression that it concerned an application for certiorari).

A second edition of Professor Hood Phillips' *Leading Cases on Constitutional Law* accompanies the textbook. Seventeen of the cases in the first edition have been left out; seven new ones have been added. In the process of deletion, the great seventeenth-century "prerogative" cases have disappeared. While one cannot help regretting this, one must agree with Professor Hood Phillips that these cases are now "either obsolete or misleading without extensive historical commentary" (p. vi). With this exception the general character of the book is unchanged. The facts of the selected cases are clearly and accurately summarised; the extracts from the judgments are well chosen. This is a useful presentation of a large number of cases in an easily manageable compass.

G. H. Treitel.

PUBLIC LAW

Winter, 1958

COMMENT

AT the end of a Parliamentary session falls the fluttering shower of Royal Assents. The statutes which had their origins in political policy statements or electioneering slogans or judicial decisions or previous faulty draughtsmanship or unforeseeable administrative difficulties, now, after fierce argument and prophecies of doom, or after sliding almost imperceptibly through remote committees and three-quarter empty Houses, settle their white pages onto the body politic. Statutes about opticians and litter, physical training and water, statutes to protect children and to control slaughterhouses, consolidating statutes and provisional orders left over from a previous dispensation, statutes which are short and clear, statutes which seem to change little but have profound consequences, statutes setting up Commissions and Investigating Committees, statutes of all shapes and sizes for all shapes and sizes of multitudinous situations, empowering new actions, spawning circulars and regulations, creating as many problems as they have sought to solve, all, as the new session begins, are being translated into some form or another of administrative activity.

The bulk of legislation varies from year to year; the number of statutory instruments rises and falls in total. But the variation is of little significance, and the programme of one political party is not, in quantity, markedly different from that of another. Nor, indeed, is its substance. While, no doubt, had a Conservative Government been returned to power in 1945, we should not have seen the same considerable statutes which made memorable (for better or for worse, according to opinion) the Labour administration in the post-war years, yet reforms of some magnitude were inevitable in that period. And today, when we consider the number and content of the statutes which received the Royal Assent in July and August of this year, we are not impressed by the comparative legislative quiescence of the Conservative administration but most by the continuing variety and ingenuity of our masters—and all this in the dying years of a Parliament, not in its early vigour.

Some measures, of course, based though they may be on electoral promises of three or four years ago, take time to mature. And this has been true of the two most notable in the past session. We mean the Tribunals and Inquiries Act and the Local Government Act.

The history of the Tribunals and Inquiries Act is well known and has been traced in the pages of Current Survey in this quarterly and in an article by Professor Robson on the Report of the Franks Committee. The speed with which the Government has implemented most of the recommendations in that Report has been almost unprecedented. It is, of course, a popular pastime to fire harpoons at the Leviathan but only Governments can effectively control Governmental power when legislative changes are needed. It looks well when Governments turn on their own servants and appear to curb their activities. But there is no doubt more to this Act, and to the departmental circulars, than the deep wish to be loved which every Government likes to see fulfilled as a General Election draws near. For here was a Report which, though not perhaps meriting all the profound thankfulness which greeted its publication, made many proposals of value. The Government—and, dare we say? many senior Civil Servants also—proved quickly willing to put these proposals into effect. Where the Government departed from the recommendations the departure was often an improvement: as in establishing one Council on Tribunals instead of two, and in leaving Departmental inspectors responsible to the Ministers on whose work they were engaged. More controversial are the provisions giving a right of appeal on questions of law to the High Court from the decisions of tribunals and those rather confused sections which except the decisions of the insurance Commissioners from this rule and then provide for the universal application of certiorari. The Council on Tribunals itself must remain a body of uncertain value until we know, first, what sort of persons are to be appointed to serve on it, and, secondly, how far Governments will be willing to be led by it. Nor will its value necessarily be great if Governments always accept what it recommends and small if Governments are more hesitant.

The Local Government Act, 1958, has an even greater potential for good or ill and its effect is even more difficult to predict. No one yet knows how its financial provisions will operate. The alarm among educationists as they see their percentage grants on approved expenditure disappear into periodic general grants is real. The Government has, on its side, perhaps protested too much its own innocence. But the educationists have not the whole of the argument. It is true that percentage grants led inevitably to considerable Departmental control. It is true that general grants could be a road to freedom. But two conditions must be fulfilled. First, the Government must mean what they say when they promise to remove certain administrative controls. And secondly, local authorities must prove willing to take the responsibility of spending more of their ratepayers' money, if this is necessary to maintain and improve standards. These are two important conditions. And it is not easy to see how far the first can be fulfilled importantly. Much local government expenditure, especially on education, is determined by bodies other than local authorities—teachers' salaries most obviously. Capital expenditure, the building of new schools, is limited by governmental decisions at the highest level and each authority takes its share of the investment programme. Neither of these controls depends primarily on the system of grants. Yet together these two items account for the great bulk of local authority spending on education. Is there room for Ministerial relaxation here? It is difficult to see any.

The present parliamentary session may be the last before a General Election. Perhaps it will therefore be lighter in its legislative programme than its predecessors. But we can be sure that, whatever is the political complexion of the next Government, we shall in a year or two be once more sheltering, with mixed feelings, from another legislative downpour.

One of the unsolved problems of public law is the relationship between the decisions of administrative tribunals and the courts of law. The relationship is unsatisfactory because its limits are not clearly defined. Tribunal decisions may sometimes be appealed from to the High Court, subject to such limitations as the statutory provisions prescribe. Certiorari, prohibition, mandamus and declaratory orders jostle for position at the doors of the courts and, if they get inside, are faced with a judicial discretion so wide that were it exercised by a Minister of the Crown, public dissatisfaction would be vociferous. Two recent decisions exemplify the difficulties which may have been increased by the Tribunals and Inquiries Act, 1958.

In *Davies* v. *Price* [1958] 1 W.L.R. 434, landlords served on the tenant a notice to quit an agricultural holding. The Agricultural Holdings Act, 1948, provides that if within a month from such service the tenant serves a counter-notice on the landlord, then the notice to quit shall not have effect unless the Minister consents to its operation. This consenting function the Minister delegated to local agricultural executive committees. In this case, the tenant served the counter-notice and the committee gave their consent. Appeal lay to the Agricultural Land Tribunal whither the tenant resorted. Now the Minister (or in this case his delegate the committee) must withhold consent unless he is satisfied that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise. The Agricultural Land Tribunal dismissed the appeal and, in doing so, said that the landlords had satisfied the tribunal that it was in the interests of efficient farming to terminate the tenancy; that the tenant was employed as a full time shift worker at a factory; that the standard of production was, and had been for some time, unsatisfactory; and that the holding had been inefficiently farmed in many important respects. The tenant applied *ex parte* to the Divisional Court of the Queen's Bench Division for leave to apply for an order of certiorari to quash the tribunal's decision, and for an order of mandamus directing them to hear and determine the reference to them of the decision of the Minister by way of appeal and to withhold consent to the operation of the notice to quit. The tenant's grounds were that the Tribunal had erred in law in failing to ensure that the requirements of the Act of 1948 had been satisfied and that they had failed to satisfy themselves, as required by that Act, that the carrying out of the purpose for which the landlords proposed to terminate the tenancy was desirable in the interests of efficient farming. The tribunal had purported, it was said, to be satisfied that it was in the interests of efficient farming to terminate the tenancy without reference to the purposes for which the landlords proposed to terminate. Further, in a statement of case prepared by the secretary of the committee for the tribunal, it appeared that it had been stated on behalf of the landlords that they had not decided, if they got possession, whether to sell or relet, and that the tribunal could not have been satisfied that the carrying out of the stated purpose was desirable in the interests of efficient farming.

The Divisional Court refused the leave sought but the Court of Appeal granted leave. The tenant then moved for the orders on the following additional grounds: that there was an error on the face of the record of the proceedings before the tribunal and that they had acted in excess of jurisdiction.

Parker L.J. said that the only reason expressed in the decision was that the tenant was a thoroughly bad farmer; that if this was the only ground then the tribunal might well be said to have erred in law; but that the tribunal was not obliged to state its reasons and had not said that the reason given was the only reason; that, as the hearing before the tribunal was *de novo* and new facts and arguments could be adduced, it was doubtful whether the statement of what was said before the committee was part of the record but in any case did not in the least help as to what was advanced and argued before the tribunal; that there was no excess of jurisdiction since the tribunal clearly had jurisdiction to decide whether to give or withhold consent;

and that the proper course was to appeal under the Agricultural (Miscellaneous Provisions) Act, 1954, which provided that any question of law arising in the course of proceedings before an Agricultural Land Tribunal might be referred to the High Court. Sellers L.J. agreed with this judgment. He added that he had not felt satisfied that the tribunal did in fact arrive at its decision in accordance with the law but was not satisfied that any error was sufficiently revealed on the face of its decision to justify the court interfering by an order of certiorari. Lord Evershed also agreed but expressly preferred to say nothing on the point whether the statement of case was part of the record.

R. v. *Patents Appeal Tribunal, ex p. Baldwin and Francis, Ltd.* [1958] 2 W.L.R. 1010 concerned a company which applied for a patent and when its specification was published, the owners of a prior patent opposed, on the ground, *inter alia,* that this specification could not fairly describe the invention or method by which it was to be performed without referring to their prior patent. The specification was entitled: " Improvements in or relating to protective systems for polyphase alternating current loads." The superintending examiner on behalf of the comptroller found, in effect, in favour of the owners of the prior patent but, on appeal to the Patents Appeal Tribunal, this was reversed. The owners of the prior patent applied for certiorari on the grounds that there was an error of law appearing on the face of the record in that the tribunal had misconstrued the rival specifications, or one of them.

Parker L.J. held that the specifications were part of the record but held that to determine whether they had been misconstrued, the court would have to be informed by evidence to understand their technical language and as on an application for certiorari the court could not look at evidence given in the proceedings or receive new evidence on affidavit, the application failed. The other members of the Court of Appeal agreed.

The person against whom a decision is given, whether by a Minister, a tribunal or a court, is not likely to be pleased with the result and will generally feel that justice has not been done. And the purpose of such decisions is not to effect a reconciliation between the disputants. But it is most desirable that final decisions should go to the substance of the issues. Of course it is necessary that some body should have power to reverse a decision if that decision were taken by someone who had no jurisdiction or who proceeded improperly. In this sense therefore " the substance of the issues " has a wide meaning. What is undesirable is that the loser in a dispute should feel that he has lost not on the substance but on a technicality. In *Davies* v. *Price* the tenant lost primarily because the Court of Appeal held that the only reason given by the tribunal might not have been the only reason it had; that if it had another (undisclosed) reason, that reason might be valid; but that the court could not inquire what other reason (if any) it had. In *R.* v. *Patents Appeal Tribunal*, the owners of the prior patent lost because the Court of Appeal could not ask the questions which would explain the meaning of certain words. Both these situations are absurd.

Behind these absurdities, lies a simpler question. Where there is an expert and qualified tribunal, how far and for what purposes do we want the courts to have power to review? Having answered that question, it is the duty of the courts and the Government to provide judicial processes which are simple and effective. Certiorari until recently was a remedy used almost entirely to control excess of jurisdiction and procedural improprieties. Then error of law on the face of the record was revived and confusion and absurdity followed. To rely, as has the Tribunals and Inquiries Act following earlier precedents, on " Dissatisfaction in point of law " is too vague. And the exclusion, mentioned above, of the national insurance, industrial injury and national assistance tribunals from this statutory right of appeal to the courts, while in itself desirable, is largely contradicted by the availability of certiorari for error of law.

The judicial system and the judicial process are part of the general ordering of our society and need to be rationalised no less than public administration itself. Arbitrary decisions proceeding from an undefined discretion are not less dangerous when handed down by courts than when taken by Ministers or administrative tribunals, but more dangerous because irresponsible. And if the courts are to justify their proud boast of protecting the individual from the might of the State, they should seek to remove the absurdities shown in these two cases.

AUSTRALIAN NOTES

In *Commissioner of Taxation* v. *Clyne* [1958] A.L.R. 474, the High Court unanimously held valid the sections of the Commonwealth Income Tax and Social Services Contribution Assessment Act, which authorise the levying of " provisional tax "; these sections enable the Government to collect taxation in advance from persons whose income is of such a character that " pay-as-you-earn " principles cannot readily be applied. In the main, the argument and the decision concerned relatively trivial questions as to the distinction between different kinds of taxation on the one hand, and measures ancillary or incidental to a single kind of taxation on the other. But the plaintiff raised an important issue, which proved irrelevant to his main argument, but on which some justices expressed an opinion. It has long been customary for Commonwealth income tax laws to provide regional concessions, so as to encourage development (especially rural development) in the arid central regions of the continent, and in parts of Tasmania where settlement is particularly difficult. The plaintiff taxpayer claimed that these concessions offended the prohibition against discriminatory taxes in section 51 (ii) of the Constitution, and also the prohibition against the grant of fiscal preferences in section 99. Both section 51 (ii) and section 99 refer to differential treatment affecting states " or parts of states." None of the income tax discriminations benefit the whole of any single state, but they do benefit areas constituting, in a geographical sense, " parts " of five states.

It became unnecessary to decide this question because even if the regional concessions were held invalid, the relevant sections were clearly severable and the taxing provisions affecting the plaintiff (who did not earn his income in a " concession " area) remained valid. But Dixon C.J. indicated in passing that he disagreed with the view as to discriminations affecting " parts of states " which had been expressed in earlier High Court decisions and apparently approved by the Privy Council in *Moran* v. *Deputy Commissioner of Taxation* [1940] A.C. 838. According to that view, there is no breach of section 51 (ii) or of section 99 unless the area in question receives an advantage " because it is part of a state," or " in virtue of its part-of-stateishness." If the law on its face merely confers some advantage, say, on the Port of Melbourne, which is not conferred on the Port of Adelaide, then it is valid (see especially *Elliott* v. *Commonwealth*, 54 C.L.R. 657). The obvious difficulty with this view is that it leaves section 51 (ii) and section 99 almost without operation so far as " parts of states " are concerned, because it is very rarely that the Commonwealth Parliament would wish to discriminate for or against a part of a state " as such "; the reason will usually be some quality of the place quite unconnected with its being in a state (such as its having a low rainfall). Although Dixon C.J. now doubts this view only in a dictum, he is known never to express such opinions unless he has carefully weighed them, and there is a possibility that eventually his opinion will be adopted by the present court. (It was rejected by Webb J., since retired, and by McTiernan J.) However, the opportunity for settling the law in this sense may be a long time arriving, at least in the taxation field, because it may not be easy to find a plaintiff with " locus standi " who desires to defeat so popular a feature of the taxation laws as their regional exemptions.

Australian Iron and Steel, Ltd. v. *Dobb* [1958] A.L.R. 513 provides an example of interaction between different regulatory systems applied in the public interest to an important industry, in a manner producing a clash of norms. There was marked difference of judicial opinion as to the way in which the clash should be resolved. The N.S.W. Coal Mines Regulation Acts deal, generally speaking, with safety conditions in mines; they follow the model of United Kingdom Acts in restricting the powers of mine owners, in particular by requiring that the appointment of the safety officials called " Deputies " should be in the hands of mine Managers, who must be properly qualified persons. The State Coal Industry Acts deal with industrial relations in the mining industry, and now vest very wide powers of conciliation and compulsory arbitration in a range of tribunals including a Local Coal Authority; this power expressly extends to ordering the employment of a particular person in a particular position, if this is the subject of an industrial dispute. In this case, a former Deputy, Hunt, who for health reasons had been moved above ground, claimed that his health had recovered and he should be reinstated as a Deputy. His Union backed his claim, but the mine manager concerned refused to reinstate Hunt, there was a strike and the Union called on the Local Coal Authority to compel Hunt's reinstatement. On prohibition to the State Supreme Court, it was argued that the Coal Industry Acts should not be treated as giving the Local Coal Authority power to override the mine manager's judgment, vested in him for specific safety reasons by the Coal Mines Regulation Acts, to choose what he considered competent and fit Deputies. One judge in the Supreme Court accepted this argument; the majority held that it was not necessary to resolve the conflict between the Acts, because at least the Local Coal Authority could bring the parties together; procure a fresh examination of the medical evidence by the mine manager and take other such conciliatory steps, so that prohibition was an inappropriate remedy at that stage.

On appeal to the High Court of Australia, two justices agreed with the dissentient in the court below. Dixon C.J. and the majority held otherwise. Their opinion is difficult to interpret, but they appear not to have acted on the majority view in the court below, and to have adopted instead the view that the power of Local Coal Authorities did override the statutory discretion of mine managers under the Coal Mines Regulation Acts. (The Local Coal Authority later acted on that view, and ordered Hunt's reinstatement.)

Examination of these opinions does not encourage confidence in the application of the traditional formal rules of statutory construction to such contemporary problems of social regulation. The maxim *generalia specialibus non derogant* was extensively canvassed in all the opinions, and the dissents rested to a considerable extent on the view that the safety legislation was " special " and the industrial relations legislation " general " for this purpose. The High Court majority suggested that the maxim could hardly be applied in such a context, and it was simply a question of establishing the powers given to the Local Coal Authority. The history of the legislation was carefully examined in the Supreme Court, but in neither court does one find a thorough examination of the questions of policy which should be relevant to such an issue. For example, in a hierarchy of values one might well place mine safety first; this would not preclude giving a wide construction to the powers of an industrial tribunal, but it would justify some consideration of the extent to which that tribunal was qualified to pay attention to safety factors, and in fact did so.

G. S.

THE CABINET IN THE COMMONWEALTH

H. V. Wiseman

The relationship between the colonial territories and the United Kingdom is a familiar subject of constitutional law. The development of the colonial legislative council has been traced in Martin Wight's general study and the subsequent studies of particular territories. When Wight's account of Colonial Constitutions brought our detailed knowledge up to January 1, 1947, he commented that from then—more accurately, perhaps, from the 1944 Jamaica Constitution—" constitutional progress broadens out, and interest is no longer focused on the changing composition of the legislature. Executive Councils are increasingly given unofficial representation and constituted as ' the principal instrument of policy.' " The emphasis shifts " from quantitative to qualitative change." [1] Constitutional lawyers are still interested in the position of the Governor and his reserve powers. Political scientists—like local politicians and administrators—are more concerned with the gradual evolution of the Executive Council into a Responsible Cabinet which is a main feature of constitutional and political development in the last decade.

Six main aspects of this evolution fall to be considered: (1) the composition of the Executive Council, (2) the method whereby its members are chosen, (3) the status of the Council, (4) its structure and mode of operation, (5) the relationship between the executive and the legislature (which is in part a function of the nature of political parties), and (6) the relationship between political Ministers and permanent officials.

COMPOSITION OF THE EXECUTIVE COUNCIL

As in the older Dominions, a first step in the evolution towards responsible Cabinet government is the addition of unofficials to the Governor's Executive Council, " a step towards a Cabinet which in the long run is the only alternative to its obsolescence and abolition." [2] In 1942, for example, Sir Ofori Atta and Mr. Korsah were added to the Gold Coast Executive Council. But the latter was not then a

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[1] Wight, *Colonial Constitutions*, Preface, p. x.

[2] Wight, *The Gold Coast Legislative Council*, p. 115.

member of the Legislative Council, and " the turning point in the growth of self-government in the British Empire has not . . . been the appointment of unofficials, as such, to the Executive Council, but of those unofficials who could command the support of an unofficial and elected majority in the legislature." [3] The addition of *elected* legislative councillors to the Executive Council is a stage beyond the addition of unofficials. When unofficials, nominated and elected, still more when elected members alone, are in a majority, " the advice tendered to the Governor by the Executive Council must possess the ultimate sanction of the legislature. . . . This principle is fundamental . . . and can only be achieved by ensuring that the Executive Council shall comprise a majority of elected Ministers." [4] The 1950 Gold Coast Constitution,[5] for example, provided for eight Representative Members from the Assembly and three *ex-officio* members. This group of eight, selected by the Governor " in his discretion "—though, in fact, he consulted with Dr. Nkrumah, whose Convention People's Party had won a majority in the elections—had to be approved by the Assembly.

The experience of Jamaica 1944–53 proves that a majority of elected members is essential to the smooth working of government. While the elected members only equalled in number their *ex-officio* and nominated colleagues they were not prepared to accept responsibility. They were envious of the position in Trinidad where from 1950 there was an elected majority in the Executive Council. On the other hand, where there is no elected majority the Governor is normally bound by the advice of the Council. As the Secretary of State emphasised in 1950 for Trinidad and in 1953 when Jamaica achieved such a majority, and as the Coussey Committee felt bound to accept for the Gold Coast, an elected majority involves provision for wider gubernatorial discretion. Even though, as in the Gold Coast, no difficulties may arise over the Governor's reserve powers, their abolition and his removal from the Executive Council are necessary to the achievement of full self-government.

One further point in relation to the composition of the Council needs to be noted. A Cabinet on the British model is not compatible with the inclusion of *ex-officio* members, whose presence moreover makes real collective responsibility (whatever is said about the " informal " collective responsibility of the elected Ministers) impossible. " The evolutionary process is completed when the *ex-officio* Ministers disappear from the Executive Council and surrender their portfolios to representative Native Ministers, retire to their subordinate positions as ordinary civil servants, and cease playing politicians." [6]

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[3] J. Wheare, *The Nigerian Legislative Council*, p. 133.
[4] Waddington Report on British Guiana, 1950, paras. 96–100.
[5] S.I. 1950, No. 2094.

CHOICE OF MEMBERS

As important as the number of elected members is the mode of their appointment to the Executive Council. The Governor may consult with the Legislative Council and nominate Executive Councillors in accordance with majority opinion, as in Sierra Leone in 1951. He may act on the advice of a "leader" in the legislature as in Barbados in 1946. Representatives on the Executive Council may be elected by the legislature—possibly with the requirement of a two-thirds majority—though the significance of such election may vary from Jamaica, with a wholly elected Assembly, to Trinidad in 1950 with eight nominated and *ex officio* as well as eighteen elected legislative councillors. Executive Councillors may be nominated by the Governor but require the approval of the legislature, as in Nigeria in 1951 (where, however, approval was by regional bodies even for the Federal Council of Ministers). Finally, the legislature may be so constituted, as a result of the development of political parties, as to make possible the United Kingdom practice of calling upon the majority leader to assume office and form a government.

The Gold Coast illustrates the form which the transition stages may take. In 1950 the Secretary of State felt unable to accept the Coussey Committee's recommendation [7] that the Assembly should elect a leader who would then advise the Governor as to his colleagues, on the argument that the party system was not sufficiently developed. The success of the C.P.P. resulted in the summons of Dr. Nkrumah from prison to form a government. Each nominee, however, had to be approved in secret ballot by the Assembly. In 1952 the position of Prime Minister was formally recognised. After an election the Governor would submit to the Assembly for its approval the name of a Member of the Assembly. If the nomination were approved, the Prime Minister would then appoint the other Ministers "in consultation with the Governor." [8] This procedure was followed after the elections of 1954 and 1956. The election of Dr. Nkrumah in each case was an inevitable result of his party's success. Approval by the Assembly was virtually a formality. It was dispensed with under the new Constitution for an independent Ghana.

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[6] Padmore, *The Gold Coast Revolution*. (I have substituted "Executive Council" for "Legislative Council" which seems to be an error.) This is now the position in, *e.g.*, Ghana, Nigeria (Centre and all three Regions), Sierra Leone, Jamaica, Trinidad, Malaya, and in recent proposals for Singapore.

[7] Col. No. 248, 1949.

[8] S.I. 1952, No. 455.

The removal of elected representatives from the Executive Council may also cause difficulty. During the transitional period the Governor may be empowered to remove an Executive Councillor without the agreement of the Prime Minister (if there be one) or the other elected members. There has, however, been no example of disagreement on such issue. The Prime Minister may also have such power. Dr. Nkrumah, for example, first removed Dr. Ansah Koi from his department and appointed him as Minister without portfolio, and then dismissed him from the Executive Council. It has sometimes been provided that the legislature may by its vote—normally with a two-thirds majority—remove a Minister (*cf*. Jamaica 1944, Nigeria 1951, the Gold Coast 1950). This is incompatible with collective responsibility and may occasion difficulty when, as happened in Jamaica, the party in office does not possess a two-thirds majority and must rely on the goodwill of the Opposition to achieve its end. The " removal clause " was deleted from the Gold Coast Constitution in 1954.[9]

STATUS OF THE COUNCIL

The extent to which the Executive Council has evolved into a responsible Cabinet depends, further, on its position in the Constitution. While it remains purely advisory, as under Crown Colony Government, and while the Governor may in certain circumstances reject its advice, as is normally the case where elected members are in a majority, responsible government has scarcely begun to be established. In Jamaica in 1944 the Executive Council was designated as " the principal instrument of policy." The judicial and disciplinary functions of the Council were separated from its political functions. Though to some extent this was an attempt to secure support for the new arrangements during the transitional period, and was of psychological significance, it also had practical results. The precedent was followed in subsequent constitutions. In the Gold Coast from 1950 the Executive Council began to have an existence independent of the Governor's will. Its constitutional importance was indicated by its inclusion not in the Governor's Instructions but in a separate Order in Council. It had to be consulted, subject to certain exceptions, by the Governor in the exercise of all his powers. The Governor, subject again to certain exceptions, had to accept the Council's advice on any matter on which he was obliged to consult it. The Leader of Government Business (later the Prime Minister) or any eight (subsequently six) Ministers could demand a meeting of the Council. The Council's authority was embodied in certain regulations affecting the Budget and business in the Assembly. This was clearly something very different from the old Crown Colony Executive Council.

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[9] S.I. 1954, No. 55.

STRUCTURE AND MODE OF OPERATION OF THE COUNCIL

Such status once established, the organisation of the work of the new type of Executive Council is of key importance. For what are Ministers to be responsible? The West India Royal Commission thought that unofficials' co-operation in the work of the Council might be sought, but that initiative in formulating policy must remain with the Governor. Unofficials may at a later stage be "associated with the work of departments" as in the Windward and Leeward Islands. They may be entrusted with "steering business" through the legislature and with "raising questions" in Executive Council, a position which the People's United Party found too restrictive in British Honduras. They might be "liaison officers" as a prelude to ministerial responsibility, as in Mauritius, or have "some responsibility" as in the Gambia (where it is shared with committees of the legislature, though *not* executive committees as under the Donoughmore Constitution in Ceylon). They may be asked to take "a special interest" in a group of departments as in Sierra Leone up to 1953 and in Jamaica from 1944 to 1953. They might be "responsible for the conduct of public business in the Assembly and in charge of the general policy of certain departments" as in Barbados from 1946 to 1954. They might be "in charge of departments" but only "in association with the appropriate public officer"—the anomalous position in Nigeria between 1951 and 1953.

These various degrees of responsibility may be necessary steps, according to conditions in various territories, in the progress towards ministerial responsibility. Where no experienced Ministers are available, or are available in insufficient numbers, or where it is desirable to include someone in the Council for certain reasons, *e.g.*, a Chief, although he may have neither the time nor the ability to run a department, the structure and mode of operation of the Council cannot at once be modelled on the Cabinet as we know it. Moreover the organisation of a colonial secretariat and the relations between administrative officers on the one hand and professional or technical officers on the other are very different from what is the case in the United Kingdom. Colonial experience since 1945, however, seems to show that the necessary administrative reorganisation ought to be undertaken in advance of the establishment of ministerial responsibility if the system is to get off to a fair start. This implies the formation of suitable Government Departments, the appointment of Permanent Secretaries and the assignment of proper administrative staff to departments. So long ago as 1931 the Donoughmore Commission stated that " in order therefore that the new Ministers . . . may be given every chance of success, it will be essential for them to take over the control not of Ministries which exist only on paper and which they would be compelled to create but of Ministries which have already been organised." [10] The experience of Jamaica (1944–53) and of Nigeria (1951–53) amply supports this opinion. Decentralisation from the secretariat, integration between the sections or departments of a ministry, the appointment of a Permanent Secretary to each Ministry; these are the prerequisites of an effective system of ministerial responsibility.

The Gold Coast provides an example of the application of these principles. By the 1950 Order in Council the Governor (from 1952 in consultation with the Prime Minister) might " charge any Member of the Executive Council with the responsibility for any department or subject." Departments had been set up in preparation for the new system. There was a Permanent Secretary for each department who " subject to the general direction and control of his Minister, shall exercise supervision over the department or group of departments for which his Minister is responsible." Collective responsibility was ensured, when the *ex-officio* Ministers were removed, by the existence of a one-party majority. No basic changes were required when independence was achieved in 1957.

MULTI-RACIAL SOCIETIES

Before discussing the last two of our six main aspects, some reference must be made to the peculiar problems of the multi-racial society, where the composition and structure of the Executive Council pose additional difficulties. In Malaya the problem was at least temporarily solved by the electoral success of the U.M.N.O–M.C.A.–M.I.C. Alliance which made possible a multi-racial Cabinet based on a majority party, though it is by no means certain that communalism may not re-emerge. In Singapore the Labour Front and its allies were able to form an inter-racial yet politically homogeneous Executive Council. In Mauritius the Labour Party has something of the appearance of a multi-racial organisation, though in the absence of a general acceptance of its claim to be genuinely multi-racial it was deemed necessary to suggest, first, the election of the Executive Council by the Legislative Council through a system of proportional representation and, subsequently, the nomination to the Executive Council by the Governor of members drawn from all the major elements in the legislature.

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[10] Cmd. 3131, 1928.

In East and Central Africa, however, no such simple solutions have been, or yet appear, possible. The composition of the Executive Council, even when it remains purely advisory, has raised difficulties. So has the problem of ensuring the association of Africans with the work of government in ways affording a smooth transition to the ministerial system. Contrary to experience in some West African territories it has been easier to achieve Administrative reorganisation (the " Member " system) than to include Africans in the highest levels even of an incompletely reorganised administration.

Africans (and Asians) feel the need to be represented at the level where decisions are made. They are not necessarily content with the degree of representation offered to them on the Executive Council, nor, indeed, to accept willingly the principle of multi-racial representation at all. Further, in the absence of parties which include all races, appointment to the Executive Council can be made only in ways which militate against the development of effective collective responsibility. If nominations are made on a racial basis by the Governor, Ministers must either accept responsibility to him, or, by concerning themselves overmuch with the sectional interests of their own racial community, virtually abjure collective responsibility. If they are nominated on the advice of their own racial colleagues in the legislature, or elected by those colleagues they are again likely to feel compelled to regard themselves as representing primarily their racial groups. Ministers, it has been suggested, might be appointed only from members elected on a common roll. This presupposes a common roll and a franchise which ensures the election of representatives of all races. In fact, agreement is usually easier to achieve on some degree of multi-racial nomination to the Executive Council than on a common roll.

Attitudes are as significant as machinery. Europeans may be reluctant to accept African representation on the Executive Council at all; more reluctant to allow freedom of choice of such representatives by Africans themselves. In Kenya, the Europeans led by Group-Captain Briggs argued for appointment " on merit," though after the 1956 elections they accepted ministerial appointment by nomination, which included an African Minister. If, however, Europeans claim—as they and the Secretary of State claimed in respect of Northern Rhodesia in 1954—that there is no African capable of performing ministerial functions, Africans are likely to mistrust the definition of " merit." On the other hand, Africans may be unwilling to co-operate in a multi-racial government for fear of being persuaded into compromises which cause their followers to describe them as " stooges." In Kenya, Mr. Ohanga, appointed African Minister in 1954 and again in 1956, was decisively rejected by the electorate in March, 1957. Mr. T. Mboya's subsequent refusal to accept nomination to the Council of Ministers, though ostensibly based upon the belief that as a condition of participating in the government Africans should be given greater representation, undoubtedly had this danger in mind also.

Despite such difficulties, progress so far, however tentative, has been on the orthodox lines of developing the Executive Council by adding unofficials and of arranging its procedure so as ultimately to make it "the principal instrument of policy" operating on the ministerial system. In Nyasaland only the earliest stage of development has been reached. There is no ministerial system, and although one African sits on the Executive Council, it remains purely advisory. In Northern Rhodesia, administrative reform has proceeded further and Europeans have achieved quasi-ministerial status, but there is still no African representative in the Executive Council. Discussions are at present proceeding in regard to a new constitution. In Tanganyika in 1957 a ministerial system was introduced on a multi-racial basis. In Uganda, despite objections to the multi-racial basis of selection, there has been a ministerial system since 1955, with three African Ministers out of five, and African Parliamentary Secretaries.

Kenya epitomises all the difficulties of attempts to develop a responsible Cabinet in a multi-racial society. There is space, however, for only brief reference. The "Lyttelton Constitution" of 1954 established a Council of Ministers of six officials and one Asian, one African and three European unofficials. In 1956 agreement was reached for one additional European and one additional African Minister. This, however, was not implemented. In the elections in March, 1957, six of the eight retiring Africans, including the Minister, Ohanga, were defeated. Mr. T. Mboya emerged as the leader of the African unofficials who refused to participate in the "Lyttelton Constitution" or even to discuss it until fifteen additional African seats in the Legislative Council were granted. In October it was decided to provide for six additional elected and one nominated Africans, with twelve members, four of each race, elected by the Legislative Council itself. The Council of Ministers would consist of eight *ex-officio* members, two nominated officials and eight elected members (four European, two African and two Asian). Mr. Mboya's group has consistently refused to participate in the new arrangements and the two African Ministers were appointed from among the "aldermen." The problem seems no nearer a solution since genuinely representative Africans are precluded from sharing in the acquisition of ministerial experience and multi-racial parties still seem a long way off.

THE EXECUTIVE AND THE LEGISLATURE

We may now return to our general survey and consider the two other aspects of our subject. An effective Cabinet system depends upon a rational division of functions and the development of the right mutual attitudes between the executive and the legislature under a system in which the former is in practice an important—perhaps a predominant—part of the latter. Leadership in policy and legislation and, indeed, in finance, belong to the executive. Yet Ministers are responsible to the legislature and need to be sustained by it. So, in unusually wide terms, Sir Ivor Jennings has defined the Government as " the Ministry together with the M.P.s who are prepared to vote for it on a vote of confidence."[11] Partly discipline and a close understanding between Ministers and their supporters are essential. These requirements are not easy to come by in colonial territories.

The nature of parties and the attitudes of assemblies are the two major problems. They are inter-related but we attempt briefly to analyse each separately. In 1949 the Secretary of State made two clear pronouncements on the connection between parties and responsible government. He told those who had demanded immediate self-government in Trinidad that " experience shows . . . that the success of Parliamentary Government depends largely on the existence of responsible political parties with coherent and definite programmes." He refused to accept the Coussey Committee's proposal for an elected Leader of the Assembly in the Gold Coast on the ground that there were no clearly defined parties. Sir Ivor Jennings, on the other hand, has pointed out that " one cannot . . . expect a colony to wait for self-government until it has developed a firm party system. Such a system is not the condition precedent to Cabinet Government but a consequence which flows from it. . . . A party system is needed for Cabinet Government, but one way to encourage the development of a party system is to establish Cabinet Government, even if it be partial."

But parties developed during the struggle for self-government do not necessarily operate effectively when the end is achieved. Their one programme is independence. Leaders are more important than policies, Congresses claiming to represent the whole community than parties divided rationally on a social, economic or ideological basis. The result is often one party only, or a proliferation of parties with little difference between them. Moreover, members join and leave parties with an ease—and an impunity—impossible in the United Kingdom. They may join a party *after* an election as in Nigeria and

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[11] Jennings, *The Constitution of Ceylon*, pp. 74 *et seq.*

Sierra Leone in 1951. Or, a party may lose support once power is achieved and members are frustrated by their leader's new moderation—the responsibility of office. Even the C.P.P. in the Gold Coast began to fray at the edges after its electoral success in 1950. Further, though one party may achieve a majority, there may be no organised Opposition to constitute an alternative Government. Malaya, Barbados, and, at least until recently, Ghana, in their different ways, illustrate this danger. It is impossible to deal more fully with the problem here. Suffice it to say that when the legislature is small, when parties are weak, when the defection of even two or three supporters puts the administration in peril, when opposition comes as much from back-benchers on the Government side or from dissident members of the Government itself as from the Opposition, responsibility is not easily developed. Ministers themselves may be unable to withstand their supporters' demands and may even seek to throw responsibility back on to the permanent officials.

Many of these problems derive not only from the nature of parties but from experience in the Legislative Council under Crown Colony Government. In 1916 Sir Hugh Clifford told the Gold Coast Legislative Council that " in no circumstances whatever can the unofficial members displace the official members and take over their duties from them. There is no such thing . . . as a Government and an Opposition." As recently as 1941 Sir Arnold Hodson told the same Council that he did not look upon the unofficials as the Opposition but as part and parcel of the Government. Such attitudes were bound to make the Legislative Council either ineffectual or a centre of revolt. The latter is more likely when unofficial and elected members are in a majority. Then the problem becomes one of fractiousness and irresponsibility rather than complacence and unquestioning co-operation. The first elections after the conferment of a greater degree of responsibility usually bring about the defeat not merely of the " yes-men " but of the moderates, and the success of the more vocal legislative councillors and those with little experience of government. The danger then is that fractious opposition may continue even to newly-elected popular Governments. Ministers are then unable to rely upon consistent support in the legislature and unwilling to risk defeat by accepting responsibility. The problem is exacerbated if, as in Nigeria, no one party can win a majority and each Government is a coalition of two or three parties, some of whose leaders may prefer the role of critic to that of Minister—like Chief Obafemi Awolowo after the elections of 1951. Government may even break down altogether as in British Guiana.

MINISTERS AND OFFICIALS

The attitude of Ministers, affected thus by their relations with the legislature, may then react upon the permanent officials. Ministerial-official relationships are, in fact, the last aspect of our subject. Such relationships are in theory simple: the Minister is constitutionally supreme and answerable for each and every act of his department. In practice, " everyone with the least acquaintance with government cannot but be aware that there is a give and take between every Minister and his chief officials which makes the latter unseen partners, as it were, in the purposes he seeks to implement." [12] Human factors are involved in this process of give and take and set against these " the constitutional relationship which establishes the Minister as unquestionably predominant is unimportant." [13] The attitudes and conventions necessary to the successful working of this delicate balance of power and influence are not easy to come by against a background of Crown Colony Government.

Ministerial-official relations, unlike other aspects of Cabinet government, cannot be institutionalised. Even when the constitutional conventions are embodied in an Order in Council as in Ceylon, Malta and Ghana, their day-to-day working is more a matter of spirit than of form. Indeed, elaborate machinery may hinder rather than help. The Waddington Commission on British Guiana, for example, while anticipating loyal co-operation between Ministers and officials, recommended formal arrangements to resolve possible disputes. The official would submit a written statement of his own standpoint to the Minister who would forward it with his observations to the Cabinet for decision. Such provision was included in the 1951 Trinidad Constitution and in the 1954 Constitutions for the Gambia and the Windward and Leeward Islands. The best that can be said of such formal arrangements is that while they may be deemed necessary in the early stages of a ministerial system their frequent use could only imply failure to work the system properly. Like the Governor's reserve powers they must remain the medicine and not become the daily diet of the Constitution. Only a sick man requires constant doses.

There are, however, some institutional arrangements which appear to be a *sine qua non* of success, though of themselves they cannot ensure it. For example, the powers and status of Ministers must be clearly defined and the responsibility conferred on them must be real. Where this is not done, as in Jamaica (1944–53) and Nigeria (1951–53) disputes and an evasion of responsibility are inevitable. As the Rendel Commission on Singapore insisted, Ministers must perform

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[12] Laski, *Reflections on the Constitution*, p. 165.
[13] Critchley, *The Civil Service Today*, p. 83.

"in fact . . . all the duties normally performed by the Cabinet in a fully self-governing State." In the Gold Coast these requirements were met from the outset. Under the 1950 Order in Council the Governor (after 1952 in consultation with the Prime Minister) might charge any member of the Executive Council with the responsibility for any department. Ministers might be provided with Parliamentary Secretaries. More important, a Permanent Secretary was to be appointed for each Ministry. This may be contrasted with Nigeria where under the 1951 Constitution the Minister performed his functions "*in association with* the appropriate officer."

The allocation of duties to Ministers also presupposes the clear demarcation of the departments involved so that each is a clearly defined area of political responsibility for a single Minister. The typical Colonial Secretariat must be decentralised, work must be routed through the department's own secretariat and its Permanent Secretary direct to the Cabinet. The basis of this is the "Member System" adopted in some East and Central African Colonies from World War II onwards, and in Malaya. Failure to carry out this administrative reorganisation, as in Jamaica and Nigeria, brings inevitable difficulties. As the Donoughmore Commission emphasised, these changes ought to be "carefully prepared for and elaborated in advance of constitutional changes . . . in order that the new Ministers . . . may be given every chance of success." Ministerial control "necessitates the Minister's having only one department which is politically in his control and administratively in the control of his Permanent Secretary." [14] Such structural changes were carried out, for example, in the Gold Coast in advance of the establishment of a ministerial system, by way of contrast to Nigeria and Jamaica.

However, more important than any of these institutional devices are the attitudes of Ministers and officials. The former, drawn from the ranks of politicians who in the struggle for self-government have consistently opposed the Administration, have encouraged extremist politics, and who may have encouraged the belief that, as Chief Awolowo put it, self-government like the Kingdom of Heaven would bring all things else, must accept responsibility for their country's affairs. They must develop a constructive attitude towards problems of government, sometimes accepting policies which in the days of Crown Colony government they have rejected. They must overcome the disadvantages of inexperience without leaning either too heavily upon their officials or seeking to blame the latter for failure. There is no space to examine in detail here the way in which Ministers in different territories have matched up to these requirements.

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[14] Ceylon Sessional Paper XIV of 1944 in Cmd. 6677 (Soulbury Commission).

Official attitudes are perhaps even more important, since officials must be prepared above all to respond in accordance with the necessary conventions of ministerial responsibility. It is " a serious blunder to introduce parliamentary institutions without first making sure that the civil service understands the process." [15] In 1951 Dr. Nkrumah declared that the real test would be whether the Permanent Secretaries were prepared to co-operate with the African Ministers. The factors likely to influence colonial civil servants in their attitudes to the new system of responsible government are not easy to summarise. We can merely indicate some of them and attempt an estimate of their relative importance—bearing in mind that the severest tests must come during the early stages of the new system. Ministers then are new to their work and officials may fear a regression in efficiency. If such regression leads to mutual recrimination between Ministers and officials, each seeking to avoid blame by blaming the other, the system will get off to a bad start.

Yet colonial civil servants will have been used to a virtual mingling of ministerial and official functions. Under the new system they can no longer directly influence legislative and executive councils. They have less freedom of action, less sense of personal achievement. The Minister will get the public credit for good results while the official, as Lord Bridges has said, " aware of the political content of his work . . . must be the least political of all animals." The official has not only to be willing to apply policies in large part formulated by others, but also to demonstrate his belief in them. Racial attitudes may be a complicating factor, especially between white officials and the " new native intelligentsia " with whom, on the admission of the Director of Recruitment at the Colonial Office in 1946, the former have not always been in sympathy, but who are most likely to be Ministers. Against a background of past recrimination and misunderstanding, fostered by the local press, fruitful human relations are inevitably difficult to develop.

Further, colonial administrators have for long enjoyed considerable autonomy. They have been effectively controlled neither by the local legislature nor by the Colonial Office and Parliament. Many heads of departments are technical or professional officers who may find it less easy to adjust themselves to a ministerial system.[16] The spirit and training of the Colonial Service in general has not been those of the Home Civil Service where the implications of ministerial responsibility have for long been understood and respected; in no field of public service has the bureaucracy been more unhampered than in the Colonies. Frequent transfers and loyalty to a unified service rather than to a particular territory also create an atmosphere different from that at home. Yet, in the Gold Coast, for example, many of these difficulties were overcome. Sir Charles Arden-Clarke and the permanent officials were, in fact, accused of being pro-C.P.P.!

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[15] *The Economist*, April 7, 1956, " Singapore's Sack Race."

[16] For a brief discussion of this point, *cf.* Kelsall, *Higher Civil Servants in Great Britain*, p. 194.

Nevertheless, there as elsewhere, as it became clear that a local civil service free from the Secretary of State's control must be established, many colonial servants began to fear for their positions. Guarantees of salaries, pensions, retirement rights and freedom from political influence had to be ensured. There was alarm at the growing demand for the appointment of more Africans to top-ranking posts and even for the complete replacement of " expatriates."

The Local Civil Service and Cabinet Government

This brings us to our last general point, the relationship between the establishment of a locally-staffed civil service and the successful working of Cabinet government. The status of the civil service is not just an administrative question. Even though colonial leaders do not aim to make the public service a political body " it has inevitably become a subject of great political interest because political advance had outstripped the advance of Africanisation." [17] The placing of local men in the key administrative, legal and financial posts is a logical sequel—better, a preliminary—to self-government. The pace of " Nativisation " must depend on the available personnel. Moreover, it is not a *substitute* for political independence. Nevertheless a local service may help, first, in a *general* way, by creating a better atmosphere in which the ministerial system may work. Dr. Nkrumah had frequently to assure the Assembly that he " had embarked on a full-blooded policy of Africanisation. . . . There can be no doubt that African civil servants would best understand their own people."

Whether a local civil service will more-or-less easily develop the attitudes required by the ministerial system is another matter; the answer will depend upon the qualities we may expect to find in the locally recruited officials. In Grenada, for example, it was feared that the educated civil servant was unsympathetic towards the majority party. There is also the question of corruption and of different—not necessarily inferior—standards. (Nepotism may be a harsh word for a Confucian concern for the family!) Impersonal standards of integrity, loyalty to a profession rather than to a person, may not easily be understood. Loyalty to a Minister is a function of loyalty to a system, a conception not easily understood where personality counts for so much. All these problems are bound up with the question of politics in the civil service. Ministers and officials frequently belong to the same educated class which has been in the forefront of the struggle for independence. Nor has the service always been so dissociated from politics as in the United Kingdom and " these modifications of British practice seem well justified since . . . in many colonial areas a majority of the educated persons are civil servants." [18] Yet political connections must be severed when a full ministerial system is established. Hence the importance of the Public Service Commission.[19] As Dr. Nkrumah declared in 1953, " it should be remembered that the provisions of the Constitution relating to the Civil Service were designed to perpetuate the best British traditions that the Service should be kept completely free from political influence." In conclusion, it is clear that whether a local civil service is a pre-requisite of self-government it will inevitably be demanded as a necessary feature of it

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[17] Padmore, *op. cit.*, p. 190.

Of the six aspects of the evolution of the Executive Council into a responsible Cabinet, ministerial-official attitudes have been the least easy to discuss systematically and most difficult to solve by means of institutional devices. Parliamentary government is never just a matter of constitutional forms. Without the assistance of ever-developing conventions it must inevitably fail. The lawyer can devise the forms; the statesman alone can make them a living reality.

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[18] *Western Political Quarterly*, June, 1956, pp. 258–282.

[19] *Cf. Journal of Public Administration, Autumn*, 1951, Sinker, " What are Public Commissions For? "

THE DECLARATORY JUDGMENT *v.* THE PREROGATIVE ORDERS

I. ZAMIR

WHEN the declaratory judgment first entered the exclusive society of supervisory remedies, which was within living memory, hardly anyone could have foretold the promising career lying ahead of it. The other members—bearing such impressive names as habeas corpus, prohibition, certiorari, mandamus and *quo warranto*—could rightly be proud of a very fine history. They were well established, respectable and respected. Each of them had its well-defined sphere of activity, in which it gained both experience and applause. Each had, as might be expected, its particular ways, manners and caprices, which could be traced back to the days of their forefathers. Some of their rigid principles, it must be admitted, have been modified to suit modern times. But many others, though having no better reason to support them than their ancient origin, have been as unshakable as those of any other society of noblemen. And although it did not escape their notice that here and there their manners were labelled extraordinary and outdated, they seemed to be quite content with themselves. They had reasonable ground to believe that they would pass the rest of their days conducting their business in safety and esteem, much as before.

But, alas, into this quiet Victorian atmosphere the declaratory judgment has unexpectedly intruded. It was not officially asked to join them as a supervisory remedy, and certainly was not introduced by any of the other supervisory remedies. Indeed it is not even clear exactly when and how it did join the others. It is, however, known that it is of comparatively recent origin (its centenary could have been celebrated only a few years ago), and that it started its career as an ordinary—and not extraordinary—remedy. The declaratory judgment very quickly proved that being young meant being ambitious, daring and unfettered by rusty principles. It has soon become commonly acknowledged that it is a straightforward remedy, cheap, effective, and with a very wide field of operation. It is not surprising, therefore, that it has by now established itself as equal to the others; it is in a great and constantly increasing demand; and it has every prospect of becoming *primus inter pares,* possibly even of sending the prerogative orders to an early, though partial, retirement.

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It is the purpose of this article to examine to what extent the declaratory judgment has established itself *vis-à-vis* the prerogative orders as a supervisory remedy. It is proposed to show, first, that the availability of a prerogative order in any particular case does not exclude the declaratory judgment; secondly, that the declaratory judgment may be employed virtually in all cases and on all grounds which warrant the issue of a prerogative order; and thirdly, that it has some important advantages over the prerogative orders.

1. THE AVAILABILITY OF A PREROGATIVE ORDER DOES NOT EXCLUDE THE DECLARATORY JUDGMENT

The prerogative orders are extraordinary remedies; the declaration of right is an ordinary and a very general remedy. It may, consequently, be thought that when an extraordinary remedy, "with its special features and requirements and history,"[1] is applicable, it should be preferred to, and possibly exclude, the ordinary remedy.

Indeed, two cases are sometimes read as holding that a declaration is not available where a prerogative order can be issued.[2] The first is *Baxter* v. *London County Council.*[3] In this case, the plaintiff, who was a coroner remunerated by the defendant local authority, claimed, *inter alia,* a declaration that he was entitled to a certain fixed salary, and not to a reduced one as maintained by the defendants. Day J., though on the merits of the case he concluded in favour of the plaintiff, held that in the circumstances he had no jurisdiction to make a declaration of right, and dismissed the action. He said[4]:

> "The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got, is by a prerogative writ of mandamus."

But this decision, it is submitted, should not be read as saying that the declaratory judgment was ousted by the mere availability of mandamus. The learned judge refused to make the declaration not because mandamus could lie but on other grounds. A declaration of the plaintiff's right, so he held, could not be granted since that right could not be enforced in the same action nor could any consequential relief be given by the court. This reasoning, it may be observed, being one of many instances of the judicial conservatism which confronted the declaratory judgment in its early days, was clearly misconceived and was later authoritatively held to be so.[5]

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[1] *Everett* v. *Griffiths* [1924] 1 Q.B. 941, 956.
[2] See, *e.g.*, Halsbury, *Laws of England*, 3rd ed., vol. 22, p. 749.
[3] (1890) 63 L.T. 767.
[4] At p. 771.

The second case is *Everett* v. *Griffiths*.[6] There the plaintiff, who was an inhabitant of a certain parish, claimed a declaration that the defendant was disqualified from sitting as a member of the board of guardians of that parish. McCardie J. held that the action was not maintainable, as the proper procedure was by way of an information in the nature of *quo warranto*.[7] It is not altogether clear whether the learned judge thought that he had no jurisdiction to make a declaration where *quo warranto* was available. The doubt as to his opinion arises mainly from his *obiter dictum*[8] that " if all parties consent proceedings by action may be useful and probably permissible." Since consent cannot give jurisdiction, this opinion can hardly be reconciled with a denial of jurisdiction. However, even if we admit, for the purpose of argument, that the learned judge dismissed the action on the ground that he had no jurisdiction, and not in the exercise of his discretion, the case would still not be an authority, now that informations in the nature of *quo warranto* have been abolished and replaced by actions for injunctions and declarations.[9] Nevertheless, one point made by the learned judge deserves examination since it is applicable also to the prerogative orders. *Quo warranto* proceedings, he said, had to come before a Divisional Court, and if an action was allowed, this requirement could have been evaded. The same requirement applies at present, under Order 59, r. 1, of the Rules of the Supreme Court, to the prerogative orders as well as to the proceedings substituted for the *quo warranto* informations. But this rule provides also that it

> " shall not be construed as taking away any power of a single judge, which would exist but for this Rule, to hear any such proceedings."

A fortiori, it seems, it should not be construed so as to encroach on the wide declaratory power given to a single judge by Order 25, r. 5, of the same Rules.

Is there, then, any other reason to induce courts to insist that a matter triable by a single judge should be tried by a Divisional Court only? It is submitted that there is none. The last two cases, it has been suggested, are not authorities on this point. On the other hand, there is ample authority to support the proposition that a declaration may be made in circumstances in which a prerogative order could issue.

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[5] See *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536, C.A., and *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* [1921] 2 A.C. 438, H.L.

[6] [1924] 1 K.B. 941.

[7] Approved, *obiter*, in *Everett* v. *Ryder* (1926) 135 L.T. 302, 304.

[8] At p. 956.

[9] Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 9.

The first clear case to this effect was *Cooper* v. *Wilson.*[10] The plaintiff, a police officer, was dismissed from the police force shortly after he had handed in a resignation notice, and his dismissal was approved by the local Watch Committee. He claimed a declaration that he had duly resigned, that his dismissal was therefore invalid, and that consequently he was entitled to certain payments. The defendants argued that the decision of the Watch Committee could be challenged only on appeal, pursuant to the Police Appeals Act, 1927, or by certiorari. The majority of the Court of Appeal (Greer L.J. and Scott L.J.: Macnaghten J. dissenting) rejected this argument and made the declaration claimed. Greer L.J., in the leading judgment, said [11] that he did not think

> "that the power which [the plaintiff] undoubtedly possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal."

Cooper v. *Wilson* was followed in *Barnard* v. *National Dock Labour Board.*[12] In this case the plaintiffs, registered dock workers, were suspended from work by a port manager, and their appeals to a statutory appeal tribunal were dismissed. They claimed a declaration that they had been wrongfully suspended. The defendants submitted that the only way to question the decision was by order of certiorari. And, indeed, the case by its nature was clearly suitable for certiorari, though it could not lie in the circumstances since the time for such an application had already expired. Yet the Court of Appeal held unanimously that it had power to make the declaration asked for. Denning L.J. (as he then was), said in his judgment that he did not doubt that the court had power to interfere with the decisions of statutory tribunals, not only by certiorari, but also by way of declaration.

> "The remedy of certiorari," he then added,[13] "is hedged round by limitations and may not be available. Why then

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[10] [1937] 2 K.B. 309. For an earlier authority, in which declaration and injunction were granted in respect of a non-judicial decision of a local authority though this decision could under statute be challenged by certiorari, see *Tynemouth Corporation* v. *Att.-Gen.* [1899] A.C. 293, H.L. Lord Morris said (at p. 305): "While the Queen's Bench Division is given full authority over every order of the council, it is not enacted, or suggested in the enactment, that that is to be the sole remedy."

[11] At p. 321.

[12] [1953] 2 Q.B. 18.

[13] At p. 41.

> should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country."

And in a later case Denning L.J. remarked:

> "Since *Barnard* v. *National Dock Labour Board* I take it to be clear law that the Queen's courts can grant declarations by which they pronounce on the validity or invalidity of the proceedings of statutory tribunals." [14]

This principle has recently received the implicit approval of the House of Lords in *Vine* v. *National Dock Labour Board*.[15] The plaintiff, a dock labourer, was dismissed by the defendants. He claimed a declaration that his dismissal was illegal and damages. The defendants' decision of dismissal was, as expressly stated by the majority of their Lordships, of a judicial character, and as such it could have been challenged by certiorari. Nevertheless, the House granted the relief, both declaration and damages, which was asked for. It may be observed that had it been decided in this case or in *Cooper* v. *Wilson*,[16] that the plaintiff could only apply for certiorari, he could not have obtained damages in the same proceedings.

It is worth while mentioning that the fact that in *Cooper* v. *Wilson* the action was not for a declaration only, was given much weight in an important Australian case. In *Toowoomba Foundry Proprietory, Ltd.* v. *The Commonwealth*,[17] the High Court of Australia held that the decision of an administrative tribunal acting under a statute or a regulation might not be challenged in an action claiming only a declaration that the decision was invalid, the appropriate proceedings being prohibition or certiorari. *Cooper* v. *Wilson* was distinguished on the ground that there the main claim by the plaintiff was monetary and the claim for declaration as to the invalidity of the administrative decision was only incidental. But this distinction, it is submitted, cannot be supported in view of subsequent authorities in which, though certiorari was available, mere declarations of the invalidity of administrative decisions were granted.[18]

What was above said of certiorari applies also to the other prerogative orders. There is no reason, it seems, for making fine distinctions on this point between these orders. And, indeed, in one case an action was brought for a declaration though habeas corpus could have been applied for [19]; and in numerous other cases the courts entertained claims for declarations that public bodies were under a duty to act in a certain way, though mandamus was probably available.[20]

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[14] *Healey* v. *Minister of Health* [1955] 1 Q.B. 221, 237, C.A. And see also *Pyx Granite Co., Ltd.* v. *Ministry of Health and Local Government* [1958] Q.B. 554, C.A., *per* Lord Denning at 571, but *contra, per* Hodson L.J. at 579.

[15] [1957] A.C. 488.

[16] *Supra*, note 10.

[17] (1945) 71 C.L.R. 545.

[18] *Barnard* v. *National Dock Labour Board*, *supra*, note 12; *Taylor* v. *National Assistance Board* [1956] P. 470, [1957] P. 101, C.A., [1958] 2 W.L.R. 11, H.L.

We may then conclude that the availability of a prerogative order does not exclude the power of the court to grant a mere declaratory judgment. Yet, it does not follow that proceedings for declarations will in such cases be always sanctioned by the court. The court, in its discretion, may still refuse to make a declaration on the ground that a prerogative order is a more appropriate remedy in the particular circumstances. It is significant, however, that in virtually none of the cases in which a declaration was claimed though a prerogative order was available the court regarded the prerogative order a more suitable remedy. And it is suggested that only in exceptional cases, if at all, will the court decline to grant a declaratory judgment on the ground that the plaintiff should have proceeded for a prerogative order.

2. DECLARATIONS MAY BE MADE ON ANY GROUND WHICH WARRANT THE ISSUE OF A PREROGATIVE ORDER

The scope and the merits of the declaratory judgment will now be compared to those of the two most extensively used, and hence the most important, prerogative orders: certiorari and mandamus. In this section the grounds on which each of these remedies may issue will be examined.

Certiorari

Certiorari may be granted where an inferior tribunal acts in excess of jurisdiction, when it violates the rules of natural justice, if its decision was obtained by fraud, or when an error of law is apparent on the record of its decision. How does the declaratory judgment compare with this?

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[19] *Liversidge* v. *Anderson* [1942] A.C. 206, H.L. The action failed because of the refusal of the court to order the defendant to give particulars of defence, but no comment was made against the form of the proceedings.

[20] See, *e.g.*, *Stuart* v. *Haughley Parochial Church Council* [1935] Ch. 452, affirmed [1936] Ch. 32 (a declaration that the plaintiff was entitled to have his name reinstated on the electoral roll of the defendant parish, and consequential relief); *Williams* v. *Mayor of Manchester* (1897) 13 T.L.R. 299 (a declaration, upon a case stated, that the plaintiffs were entitled to inspect the minutes of committees submitted for approval to the defendant council); *Oddenino* v. *Metropolitan Water Board* [1914] 2 Ch. 734 (a claim for declaration, dismissed on the merits, that the plaintiff was entitled under statute to be furnished with a sufficient supply of water at a certain rate).

(i) *Excess of jurisdiction.* A declaration may be granted that a decision made in excess of jurisdiction is void and of no effect.[21]

(ii) *Natural justice.* A decision arrived at in violation of the rules of natural justice may be declared invalid.[22]

(iii) *Fraud.* The courts have not as yet been confronted with the question whether a decision obtained by fraud may be declared invalid. It may, however, be safely expected that when the occasion arises the courts, which readily granted declaratory judgments for lesser defects, will hold themselves competent to declare the invalidity of decisions affected by fraud.

(iv) *Patent errors of law.* In *Barnard* v. *National Dock Labour Board*[23] it was observed that both in that case and in *Cooper* v. *Wilson*,[24] the question in dispute was akin to a question of jurisdiction, *i.e.*, whether or not the inferior tribunal had acted *ultra vires*. So, it should be added, was the question in *Vine* v. *National Dock Labour Board*.[25] It might, consequently, be doubted whether the *ratio* of these cases should not be limited so as to allow declaratory proceedings to be instituted, where certiorari could lie, only for excess of jurisdiction and not for errors of law.[26] But such doubts, which cannot be supported by any logical reason, are inconsistent with at least two authorities. The case of *Taylor* v. *National Assistance Board*[27] shows that a declaration may be made, where certiorari could issue, even though the decision challenged is clearly *intra vires* and only alleged to be wrong in law. The plaintiff in this case, a wife respondent in a divorce suit, was offered by the defendant Board a civil aid certificate, to enable her to defend that suit, on certain terms as to the contribution she was required to make. She alleged that the defendants, in assessing her disposable income for the purpose of calculating this contribution, wrongly took a certain factor into account, and she brought an action for a declaration to that effect. It was objected by the defendants that certiorari would have been an appropriate remedy, which was admitted by counsel for the plaintiff, and that that was the only proper way of challenging their decision. Lord Merriman P., assuming that certiorari was available, overruled this objection, and made the declaration asked for. On appeal his

[21] See *Cooper* v. *Wilson, supra,* note 10; *Barnard* v. *National Dock Labour Board, supra,* note 12; *Vine* v. *National Dock Labour Board, supra,* note 15; *Abbot* v. *Sullivan* [1952] 1 K.B. 189.

[22] See *Cooper* v. *Wilson, supra,* note 10; *Abbot* v. *Sullivan, supra,* note 21; *Law* v. *Chartered Institute of Patent Agents* [1912] 2 Ch. 276.

[23] *Supra,* note 12.

[24] *Supra,* note 10.

[25] *Supra,* note 15.

[26] See B. Schwartz, "Forms of Review Action in English Administrative Law," 56 *Columbia Law Review* (1956) 203, 219–221.

[27] [1956] P. 470.

decision was reversed on the merits of the case.[28] The question of the court's power to make a declaration in such circumstances was not pursued before the Court of Appeal or the House of Lords. Denning L.J., however, had this comment to make[29]:

> "I would like to say in passing that I entirely agree with the President on this point. The remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations."

The second authority is *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government*,[30] in which the Minister was alleged wrongly to have exercised his discretionary powers. Lord Denning said[31]:

> "[Defendants' counsel] read us passages from *Barnard* v. *National Dock Labour Board*, and sought to deduce therefrom that the remedy by declaration only lies where there is no jurisdiction, not where it is wrongly exercised. I do not think there is any such limit to the remedy by declaration."

The Court of Appeal held by a majority that it had power to grant the declaration claimed, though it thought that on the merits it should not be made.

(v) *Latent errors of law.* Certiorari may issue only when the alleged error of law is apparent on the face of the record. Is the declaratory judgment similarly limited?

The practical importance of this question has diminished subsequent to the Tribunals and Inquiries Act, 1958.[32] This is due to two sections thereof: section 9 provides that the decisions of certain tribunals specified therein shall be subject to an appeal to, or a case stated for the opinion of, the High Court on questions of law; and section 12 provides that certain tribunals and Ministers taking decisions after holding a statutory inquiry shall accompany their decisions with a statement of their reasons. But many cases in which judicial decisions may be given, *inter alia*, the decisions of domestic tribunals, are outside the purview of these sections. In these cases the question whether a declaration of right may be made in respect of latent errors of law is still of great importance.

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[28] [1957] P. 101, C.A.; [1958] 2 W.L.R. 11, H.L.
[29] [1957] P. 101, 111.
[30] [1958] Q.B. 554, C.A.
[31] At p. 570.
[32] 6 & 7 Eliz. 2, c. 66.

No authoritative answer has been given to this question. It appears, however, that the answer should be given in the affirmative. There seems to be nothing in the nature of declaratory relief which should prevent the courts from going into errors of law not apparent on the record. It is true that the declaration of right is (apart from being an original remedy) a supervisory and not an appellate remedy.[33] But it is a supervisory remedy of the widest possible scope. There are, it is submitted, only two reasons which may prevent a declaration from lying for latent errors of law. First, that it is so limited by precedents. Secondly, that this is in the nature of all supervisory remedies. As to the first point—there are no precedents limiting the declaratory jurisdiction in this way. It remains, therefore, to be examined whether the supervisory nature of the declaration of right imposes on it such a restriction. It seems that it does not. Certiorari is so limited only for historical reasons. Indeed, it is difficult to see on what principle a tribunal should be allowed to escape supervision to a great extent by withholding the reasons for its decisions. An observation made by Denning L.J. is very instructive in this context. He said[34]:

> " I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country."

Should then an exception be made to the effect that a tribunal which does not give a fully reasoned decision may disregard the law?

Some decisions and dicta support the proposition that a declaration will lie against a tribunal for latent errors of law. In *Lee* v. *The Showmen's Guild of Great Britain*[35] the plaintiff was expelled from the defendant association under one of the association's rules which prohibited " unfair competition." The Court of Appeal, affirming the High Court, made a declaration that, since the plaintiff's conduct did not amount to unfair competition, the decision of expulsion was wrong in law and void. The question before the court was: to what extent will the courts examine the decisions of domestic tribunals which sit in judgment on the members of a trade or profession?

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[33] See *Healey* v. *Minister of Health* [1954] 2 Q.B. 221, affirmed [1955] 1 Q.B. 221.

[34] *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, 41.

[35] [1952] 2 Q.B. 329.

> "They will, I think," Denning L.J. answered the question,[36] "always be prepared to examine the decision to see that the tribunal has observed the law. This includes the correct interpretation of the rules. Let me give an illustration. If a domestic tribunal is given power by the rules to expel a member for misconduct, such as here for 'unfair competition,' does that mean that the tribunal is the sole judge of what constitutes unfair competition? Suppose it puts an entirely wrong construction on the words 'unfair competition' and finds a member guilty of it when no reasonable person could so find, has not the man a remedy? I think that he has, for the simple reason that he has only agreed to the committee exercising jurisdiction according to the true interpretation of the rules, and not according to a wrong interpretation."

And in a later part of his judgment Denning L.J. observed that the remedy by declaration was more effective than the remedy by certiorari, because the former "is not subject to the limitation that the error must appear on the face of the record."[37]

The decision in *Lee's* case concerned a domestic tribunal. But the power to make declarations, Denning L.J. pointed out, is no less in respect of statutory tribunals.[38]

It should, however, be observed that it is doubtful whether these opinions of Lord Denning, who has time and again shown himself a devoted advocate of a very broad scope for the declaration as a supervisory remedy, are shared by the other learned judges. Some judges appear to be more restrained in this matter, as *Healey* v. *Minister of Health*[39] shows. There the question whether latent errors of law made by statutory bodies may be reviewed in declaratory proceedings was raised *obiter*. Parker L.J. pointed out that the contention of such possibility was novel and far reaching, but refrained from expressing any opinion on this point. So did Morris L.J. But Denning L.J. had this to say[40]:

> "Suppose . . . that a man had served more than ten years and had reached the age of 60. Under regulation 7 he would be

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[36] At p. 343.

[37] At p. 346. The error in the present case was a gross one, as there were no facts which could reasonably support the decision: see pp. 344–347. It may be doubted, therefore, whether the court would have reached the same conclusion had the error of law been less fundamental.

[38] *Lee* v. *The Showmen's Guild of Great Britain*, *supra*, at p. 345. And see *Barnard* v. *National Dock Labour Board*, *supra*, at p. 42.

[39] [1955] 1 Q.B. 221.

[40] At p. 227.

> entitled to a pension. But suppose the Minister determined that he had no right to one. Would not the courts interfere? I think they would. There would in that case be good reason for thinking that the Minister had mistaken or misused his powers: and the court would on that ground declare his determination to be invalid."

The learned judge, speaking of a palpable error, does not seem to have distinguished between an error which appears and one which does not appear on the face of the record.

Another relevant case is *Taylor* v. *National Assistance Board*.[41] There the alleged error of law seems to have been disclosed, not by the decision itself, but only by the correspondence which passed between the plaintiff's solicitors and the defendant Board.[42] It is doubtful whether this correspondence could be properly regarded as part of the " record " so as to enable certiorari to issue. Yet Lord Merriman P. did not go into this question at all, and made a declaration to the effect that the Board's decision was wrongful. His judgment was reversed on appeal on the ground that the decision of the Board was not wrong.[43] But none of the judges sitting on appeal commented adversely on the propriety of the proceedings in the first instance.

The above cases give grounds for the expectation that the courts will hold themselves competent to inquire by declaration into latent errors of law. Whether this power, assuming it exists, will be liberally exercised, or whether the courts will in their discretion impose limits thereon, is a matter for speculation. The above-mentioned provisions of the Tribunals and Inquiries Act, 1958, will possibly encourage the courts to take a liberal line in this matter. It is believed, on the strength of the above-discussed cases, that the courts will tend to intervene in cases of manifest or gross errors of law which may be regarded as misuse of power.[44] But it seems very doubtful whether the courts will consent to examine a decision where no such palpable error is alleged to exist, as this may require a rehearing of the case and thus amount in effect to an appeal on questions of law, which may only be given by statute.

(vi) *Other grounds*. There are possibly other grounds also on which a declaration, but not certiorari, may be granted in respect of judicial decisions. Certiorari, it seems, may not issue to quash a decision of a tribunal merely on the ground that the decision is highly unreasonable.[45] The question whether declaratory relief is available in such a case has not yet been answered by the courts. There appears, however, to be nothing to prevent the declaration of right from being so employed.[46]

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[41] [1956] P. 470. For the facts of this case, see *supra*, p. 347.

[42] See *ibid.*, p. 472.

[43] [1957] P. 101, C.A.; [1958] 2 W.L.R. 11, H.L.

[44] In some cases, as Mr. de Smith has observed (note, 18 *Modern Law Review* (1955) 163, 165), the courts acting under other forms of proceedings have treated such errors as going to jurisdiction. Declaratory relief, however, would apply also to cases in which the error cannot reasonably be said to go to jurisdiction, *e.g.*, *Taylor* v. *National Assistance Board*, *supra*, and *Lee* v. *The Showmen's Guild of Great Britain*, *supra*.

Two further points as to the scope of declaratory relief have so far escaped any comment by the courts. In proceedings for certiorari the court may not inquire into questions of fact which do not go to jurisdiction,[47] or substitute its decision for that of the tribunal.[48] These limitations seem to be inherent in the very nature of the supervisory jurisdiction. It may, therefore, be assumed that they will be equally applied to supervision by declaration. But the declaration is not only a supervisory but also an original remedy. And, although usually it is employed in one or other of its capacities, it may be used in one action in both capacities.[49] It seems therefore possible for a court, in a case where the jurisdiction of a public body is not exclusive, to declare a decision of that body illegal and invalid, and then proceed, under its original jurisdiction, to adjudicate on the dispute and declare the rights of the plaintiff. It may, however, be assumed that only in exceptional cases will the court sanction such a procedure.

It should also be pointed out that in one case[50] it was held that when an award given by a statutory body is expressed in ambiguous terms the High Court has jurisdiction to determine by declaration what it means and what are the rights of the parties under it.

Mandamus

Mandamus is based on the concept of a public duty and a corresponding failure to perform that duty. It lies, therefore, primarily where a person refuses or omits to carry out a public duty—it applies also to a duty to exercise discretion in any particular case—imposed on him by common law or by statute. But its scope has been extended by way of a fiction that a person who exercises its jurisdiction on wrong grounds is deemed to have declined jurisdiction. Hence, mandamus is now available also where power is exercised in bad faith, on irrelevant considerations or for an improper purpose. These grounds warrant also, as will be presently shown, the issue of a declaration.

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[45] See S. A. de Smith, Memorandum on Judicial Control of Administrative Tribunals, submitted to the Committee on Administrative Tribunals and Enquiries, Minutes of Evidence, Appendix 1, p. 8 at 9.

[46] In *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 K.B. 223, in which a declaration was claimed that conditions imposed by a licensing authority were *ultra vires* and unreasonable, Lord Greene M.R. said, *obiter*, that the court could interfere where the authority came to a conclusion so unreasonable that no reasonable authority could ever have come to it. It is doubtful, however, whether the decision of the licensing authority could be classified as judicial.

[47] See Halsbury, *Laws of England*, 3rd ed., vol. 11, p. 63.

[48] See *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 344, 347.

[49] See *Cooper* v. *Wilson*, *supra*, at p. 344; and *cf. Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* [1958] Q.B. 554.

[50] *Lofthouse Colliery, Ltd.* v. *Ogden* [1913] 3 K.B. 120, criticised in *Guaranty Trust Company of New York* v. *Hannay & Co.* [1915] 2 K.B. 536, 555.

(i) *Failure to perform a duty.* Declarations have often been claimed to the effect that it is the public duty of the defendant to act in a certain way.[51]

(ii) *Bad faith.* Where a public body exercises its power in bad faith its act may be declared inoperative.[52]

(iii) *Irrelevant considerations.* If a public body exercises its discretion wrongly, though in good faith, by taking into account irrelevant considerations or by not taking into account considerations which it ought to take into account, or where it comes to a conclusion so unreasonable that no reasonable authority could ever have come to it, its act may be declared unlawful and invalid.[53]

(iv) *Improper purpose.* Where a public body exercises its power for a purpose different from the one for which it was conferred, its act may be declared invalid.[54]

(v) *Wrong assumption of jurisdiction.* It was said above that the scope of mandamus has been extended to cover, not only cases where a person refuses to perform his duty, but also cases where he wrongly discharges his duty. But it is questionable whether it can be further stretched to lie in cases in which a person, not being under any duty to act, wrongfully assumes and then exercises jurisdiction over a matter outside its competence.[55] To give an example: will mandamus go to a local authority which establishes the business of a laundry without statutory authority to do so? It seems doubtful whether it will. But declaratory judgment is doubtless a proper remedy in such a case.[56]

Declaratory judgment, we may sum up this section, can be given, not only on virtually all grounds on which certiorari or mandamus may be granted, but also on some grounds which do not probably warrant the issue of these remedies.

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[51] See, *e.g., Williams* v. *Mayor of Manchester* (1897) 13 T.L.R. 299; *Gillow* v. *Durham County Council* [1913] A.C. 54; *Monmouthshire County Council* v. *British Transport Commission* [1957] 1 W.L.R. 1146.

[52] See *Short* v. *Poole Corporation* [1926] Ch. 66, 90–91.

[53] See *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 233–234; *Att.-Gen* v. *Tynemouth Union* [1930] 1 Ch. 616; and *cf. Prescott* v. *Birmingham Corporation* [1955] Ch. 210, which seems to go even further by declaring invalid the decision of the defendant corporation on the only ground that it did not properly exercise its discretion.

[54] See *Grice* v. *Dudley Corporation* [1958] Ch. 329, 344.

[55] See S. A. de Smith, " Wrongs and Remedies in Administrative Law," 15 *Modern Law Review* (1952) 189, 205. But see *contra* Griffith and Street, *Principles of Administrative Law*, 2nd ed., 234.

[56] See, *e.g., Att.-Gen.* v. *Fulham Corporation* [1921] 1 Ch. 440.

3. Advantages of the Declaratory Judgment Over the Prerogative Orders

The prerogative orders may appear to have one important advantage over the declaratory judgment, and this is, that they are coercive decrees, disobedience to which is punishable by attachment for contempt of court. But this advantage is hardly as important as it may seem to be. It is difficult to imagine that public authorities, especially in England, would ignore or disobey the law once it has been declared by the court. If, however, respect for law and the force of public opinion are not sufficient to secure compliance with a declaratory judgment, there are some other sanctions to follow: expenditure incurred by local authorities contrary to the declaration may, or rather should, be surcharged by a district auditor; and the court, in subsequent proceedings, will readily grant an injunction to prevent the declaration from being disregarded, or damages to compensate for any injury caused by acting contrary to it. Where, however, the plaintiff considers coercive decree to be necessary, he may claim injunction together with the declaration.

The declaratory judgment, on the other hand, has some weighty advantages over the prerogative orders.[57] The more important ones will be mentioned here, first, in relation to certiorari, and then—in relation to mandamus.

Certiorari

Certiorari and prohibition may issue in respect of judicial or quasi-judicial decisions only. As Lord Denning said[58]:

> " It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency. . . . It applies to administrative acts as well as to judicial acts whenever their validity is challenged because of a denial of justice, or for other good reasons."

The result may be that in border-line cases if the plaintiff proceeds for certiorari, and not for declaration, his action may be dismissed just because the act complained of is classified by the court as administrative and not as judicial.[59] This, however, is more a theoretical than a practical disadvantage, since the court, when inclined to interfere with a decision, will generally classify it as judicial and will be able to support such classification by ample authority.

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[57] See, on this subject, Gordon J. Borrie, " The Advantages of the Declaratory Judgment in Administrative Law," 18 *Modern Law Review* (1955), 138.

[58] *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* [1958] Q.B. 554, 571.

But the courts have not gone, and it seems certain that they will not go, as far as to intervene by way of certiorari or prohibition with legislative measures.[60] The declaratory judgment, on the other hand, has been successfully employed for this purpose.[61]

Certiorari and prohibition are further limited to the decisions of statutory bodies only, whereas declaratory judgment may issue also against non-statutory bodies. As Denning L.J. said:

> " In the case of statutory tribunals, the injured party has a remedy by certiorari, and also a remedy by declaration and injunction. The remedy by certiorari does not lie to domestic tribunals, but the remedy by declaration and injunction does lie, and it can be as effective as, if not more effective than, certiorari." [62]

Barnard v. *National Dock Labour Board* [63] has brought to light two more advantages of the declaratory judgment over certiorari. There the action, claiming a declaration that the decision of the defendants to suspend the plaintiff from work was invalid, was instituted over two and a half years after that suspension. Certiorari, being generally limited to six months,[64] could not therefore lie, and declaration was the only remedy available.[65] Furthermore, even if certiorari were available, it could not have helped the plaintiff, since the illegality of the suspension was only disclosed by discovery of documents, which is not possible in proceedings for certiorari.

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[59] See, *e.g.*, *Nakuda Ali* v. *M. F. De S. Jayaratne* [1951] A.C. 66.

[60] A statement to the contrary made by Lord Hewart in *The New Despotism*, p. 62 is clearly misconceived. Contrast this statement with *R.* v. *Legislative Committee of the Church Assembly* [1928] 1 K.B. 411, *per* Lord Hewart C.J. at 415–416. Sometimes, however, proceedings leading to legislative measures may be of a judicial nature and thus permit prohibition and certiorari. See *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, and *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619.

[61] See, *e.g.*, *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* [1892] 3 Ch. 242; *Nicholls* v. *Tavistock Urban District Council* [1923] 2 Ch. 18; *Brownsea Haven Properties, Ltd.* v. *Poole Corporation* [1958] Ch. 574, affirmed *ibid.* 581.

[62] *Lee* v. *The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 346. For some recent cases in which declarations were made in proceeding against domestic tribunals, see *Abbot* v. *Sullivan* [1952] 1 K.B. 189; *Baker* v. *Jones* [1954] 2 All E.R. 553; *Bonsor* v. *Musicians' Union* [1956] A.C. 104; *Davies* v. *Carew-Poles* [1956] 2 All E.R. 524. The last case seems to have introduced an innovation in the field of actions against domestic tribunals by holding that a declaration and injunction are available although there is no contractual or delictual link between the plaintiff and the defendant association. But see, *contra*, *Byrne* v. *Kinematograph Renters Society, Ltd.* [1958] 1 W.L.R. 762.

[63] [1953] 2 Q.B. 18.

[64] R.S.C., Ord. 59, r. 4 (2). As to the possibility of extension of this period, see Halsbury, *Laws of England*, 3rd ed., vol. 11, pp. 72–73.

[65] The position was similar in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* [1958] Q.B. 554, 579.

Another very important feature of declaratory relief is that it may be combined with other relief, *e.g.*, damages or injunction, while a Divisional Court issuing a prerogative order cannot grant such other remedy. Thus, in *Vine* v. *National Dock Labour Board*,[66] the court awarded damages in addition to a declaration that the dismissal of the plaintiff from work was illegal and invalid.

A declaration of invalidity of a decision may also be followed by another declaration affirmatively stating the plaintiff's right. *Cooper* v. *Wilson*,[67] illustrates the importance of such procedure. In this case a decision of a watch committee, dismissing the plaintiff from the police force, was declared invalid, and another declaration was added, which could not have been done in certiorari proceedings, that the plaintiff had duly resigned and was consequently entitled to be repaid certain deductions which had been made from his pay.

Pvn

Mandamus

Mandamus, as distinct from certiorari and prohibition, applies to judicial as well as to administrative acts and decisions. But, it is believed, it has not as yet been employed to impugn legislative instruments, and it seems very doubtful whether such an innovation will be sanctioned by the courts.[68] This leaves the declaratory judgment as the only legal weapon for a direct attack on subordinate legislation.

Mandamus does not lie against the Crown or persons acting merely as agents of the Crown,[69] declaration does lie against the Crown.[70] Where, therefore, a doubt exists as to whether a public authority is or is not acting merely as agent of the Crown a declaration is clearly preferable to mandamus.

Both mandamus and declaration are discretionary remedies. In proceedings for mandamus the courts generally exercise their discretion so as to refuse the application when an alternative remedy—

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[66] [1957] A.C. 488.

[67] [1937] 2 K.B. 309.

[68] It certainly will not lie to challenge legislation made on behalf of the Crown, since mandamus cannot issue against the Crown or its servants acting in this capacity.

[69] See Halsbury, *Laws of England*, 3rd ed., vol. 11, pp. 98–99. This limitation has not probably been affected by the Crown Proceedings Act, 1947: see ss. 21 (2), 40 (5); and, for the same opinion, see G. Williams, *Crown Proceedings*, p. 150, and H. Street, Crown Proceedings Act, 1947, in 11 *Modern Law Review* (1948) 129, 138. Mandamus, however, is available where a duty is imposed directly on a servant of the Crown: G. Williams, *ibid.*, 148–150.

[70] See, *e.g.*, *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410; [1912] 1 Ch. 158. And see the Crown Proceedings Act, 1947, s. 23 (2) (*b*).

which is not less convenient, beneficial or effective—is available.[71] In contrast, the courts exercise their declaratory power much more liberally: the cases prove that the mere existence of an equally appropriate remedy will not generally be a ground for the dismissal of a declaratory action.

There are some other serious disadvantages common to mandamus and the other prerogative orders, such as the above-mentioned impossibility of combining it with any other relief, *e.g.*, damages or an affirmative declaration of the applicant's rights. Many of these disadvantages pertain to procedure, which is possibly the weakest point of the prerogative orders. Mandamus, Professor Borchard said,[72] "is surrounded by the encrusted technicalities of an ancient writ, whereas the declaratory judgment is free from such technicalities." This applies also with the same force to the brothers-in-law of mandamus.

4. CONCLUSION

The declaratory judgment, it is suggested in conclusion, compares favourably with the prerogative orders as regards the grounds on which they may be granted, the bodies against whom they may issue, and their rules of procedure. In the federal system of the United States, this being realised, the declaratory judgment in combination with the injunction have already supplanted to a great extent the prerogative orders.[73] Such development is possible and, it is submitted, may prove beneficial also in England. And, indeed, the widespread and frequently expressed dissatisfaction with the archaic prerogative orders has recently raised many prominent voices in this country in a call for the establishment of the declaratory judgment and the injunction as the common remedies in respect of administrative action. Suffice it here to quote Lord Denning[74]:

> "Just as the pick and shovel are no longer suitable for the winning of coal, so also the procedures of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence."

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[71] See Halsbury, *Laws of England*, 3rd ed., vol. 11, pp. 107–109.

[72] *Declaratory Judgments*, 2nd ed., p. 361.

[73] See K. C. Davis, *Administrative Law*, p. 729.

[74] *Freedom under the Law*, p. 126.

THE INVESTIGATION OF RESALE PRICE MAINTENANCE UNDER THE MONOPOLIES LEGISLATION

B. S. YAMEY

THE Restrictive Trade Practices Act, 1956,[1] has altered the law relating to the practice of resale price maintenance in several ways. Briefly, Part II of the Act prohibits the enforcement of resale price stipulations by the collective withholding of supplies and related arrangements, and it strengthens the position of the individual supplier by giving him a right of recourse to the courts in enforcing his stipulations against dealers who are not parties to any resale price agreement with him. (Such dealers are conveniently referred to as non-signers in American usage.) The 1956 Act came about after the investigations of the Lloyd Jacob Committee, which reported in 1949,[2] and, more directly, after the general report on Collective Discrimination by the Monopolies Commission, published in 1955,[3] though in fact neither body specifically recommended the introduction of new remedies for suppliers against non-signers.

Yet, just when it might have seemed as if public policy towards resale price maintenance had been defined after some years of public debate, a distinguished body has recently urged the need for the re-examination of this policy. The (Cohen) Council on Prices, Productivity and Incomes in its First Report refers to individually enforced resale price maintenance and recommends that policy towards it should be reviewed. The Council notes that the 1956 Act (together with the earlier legislation) has—

> " already been beneficial in stimulating a more competitive spirit among business men. But it must be remembered that in that Act the prohibition of *collective* action to enforce the maintenance of resale prices was accompanied by a provision actually strengthening the power of the *individual* manufacturer to make

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* Mr. Yamey is Reader in Economics in the University of London. He writes: " I have had the benefit of helpful discussions with my colleague, Mr. C. Grunfeld, and of guidance from Professor S. C. Hollander, of Michigan State University, on certain aspects of ' fair trade ' in the United States."

[1] 4 & 5 Eliz. 2, c. 68.

[2] *Report of the Committee on Resale Price Maintenance*, Cmd. 7696, 1949.

[3] Monopolies Commission, *Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices*, Cmd. 9504, 1955.

> such price maintenance effective. We are aware that this is a very complicated and controversial matter, and that there may be great reluctance to reconsider it so soon after the passing of the Act. But circumstances alter cases; and the great emphasis which has been placed recently by the Government on the need for price reductions—an emphasis with which, as will have been seen, we largely agree—leads us to think that this matter ought to be carefully reconsidered. We have reached no conclusion on the subject, and even if it be within our terms of reference we cannot see any hope of dealing with it ourselves." [4]

The Cohen Council calls for such a reconsideration in the light of its general conclusion that prices should be flexible and that competitive pressures on prices should be encouraged in all sectors of the economy, including the distributive trade sector.[5]

My main concern in this article is to indicate the various ways in which resale price maintenance might be subjected to re-examination, piecemeal or generally, within the framework of the present monopolies legislation. However, in the course of this discussion, some of the implications of the legislation will be noted, and attention will be drawn to problems of interpretation which have been largely neglected in the published commentaries on the statutes of 1948 and 1956. Some of these problems and issues are relevant beyond the narrow limits of the practice of resale price maintenance.

1. INDIVIDUAL RESALE PRICE MAINTENANCE AND THE REGISTRATION OF RESTRICTIVE AGREEMENTS

It is generally understood that individual resale price maintenance agreements are not subject to registration under Part I of the Restrictive Trade Practices Act, and hence will not as such come under the scrutiny of the Restrictive Practices Court in the same way as other restrictive practices embodied in registrable agreements. This would seem to accord with legislative intentions; and, indeed, should each price maintenance agreement between supplier and dealer have been registrable, the registration process and the work of the court would have been seriously embarrassed. It is worthwhile, nevertheless, to consider more closely the grounds for the exclusion of such agreements from the requirement that restrictive agreements are to be registered.

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[4] Council on Prices, Productivity and Incomes, *First Report*, 1958, para. 155. (See also *Second Report*, 1958, para. 118.)

More recently, the Labour Party, in its *Plan for Progress* (p. 42), has referred to the strengthening of the enforcement of individual resale price maintenance and concluded: "The future of resale price maintenance will . . . have to be reviewed in the light of experience. It may be that in those cases where the individual enforcement of resale price maintenance leads to abuses, selected commodities can be removed altogether from its protection or, alternatively, subjected to Governmental price control."

[5] The practice of resale price maintenance necessarily reduces or eliminates price competition in the affected branch of distribution. It may in certain circumstances also have the effect of reducing price competition in the supplying industry. *Cf.* my *The Economics of Resale Price Maintenance*, 1954.

An agreement to be registrable requires that there be two or more parties, each of which accepts one or more of five specified types of restriction.[6] The ordinary resale price maintenance agreement involves two parties, the supplier and the reseller or dealer; but one of them, the supplier imposing the restriction, does not appear to accept any restriction. Therefore, the agreement is not registrable.

This conclusion may appeal to common sense. It is arguable, however, that in certain common situations, the practice of resale price maintenance does involve an implicit restriction on the supplier's behaviour. Unless the supplier indicates distinctly, either by explicit statement or by readily observable acts of commission or omission,[7] that he does not intend to take steps to enforce the maintenance of his announced resale prices (that is, that he regards them as suggested or recommended resale prices and no more), a trader accepting the resale price stipulations assumes or believes that the supplier will impose similar restrictions on other traders, and that he will enforce his price policy against offending traders, including (since the operation of Part II of the Act) enforcement by taking action via the courts against price-cutting non-signers. Indeed, if pressed, the supplier (or his sales staff) would be obliged to indicate that there is an intention to do these things. Furthermore, when a supposedly price-maintaining manufacturer is taxed by retailers for failing to act against price-cutters, the frequent reply is that he wishes and intends to enforce his resale prices, though he may add that there are "difficulties." One certainly does not encounter the reply in such cases that the supplier, at the time of making the resale condition, reserved the right to exercise discretion in enforcing his stipulations against resellers whose price-cutting activities have been established beyond doubt. Thus, realistically, there is often an implicit undertaking to impose terms and conditions on resellers and not to supply price-cutters, involving the acceptance by the supplier of restrictions within the meaning of the Act.[8]

This reasoning may, however, be considered to be too tenuous to satisfy the law as it affects registration. But it is not irrelevant for the law in another context. In terms of section 25 in Part II of the Act, a supplier may enforce by legal proceedings a condition as to resale prices (such as is involved in resale price maintenance) against an offending trader who has had notice of the condition " as if he had been party thereto." The court (not the Restrictive Practices Court in this connection) may at its discretion grant a restraining injunction. It is submitted that it is unlikely that a court would issue such an injunction if it were established that the supplier had not been taking steps to enforce his resale conditions against other offenders known to him; *e.g.*, if it were established that the supplier himself had been supplying known offending traders, or had not taken legal proceedings, either for enforcement of contract or under section 25, against other continuing offenders known to him.[9] One imagines that the court will have to be satisfied, before granting an injunction restraining a particular price-cutter, that the supplier had been taking his resale price maintenance seriously, which, translated, would mean that the supplier intended to bind all resellers (apart possibly in well-defined situations, *e.g.*, in resales to employees), and had undertaken to take all reasonable steps to enforce his resale prices against all price-cutters. It seems especially unlikely that the court would grant an injunction against one particular price-cutter if it were established that the supplier, in effect, reserved the right to condone the activities of other, and possibly competing, price-cutters.[10] And such an attitude, if adopted, would mean that a price-maintaining supplier is deemed to accept a restriction, as argued in the preceding paragraph.

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[6] Restrictive Trade Practices Act, s. 6 (1).

[7] Such acts include the direct supply of the goods in question by the supplier to a dealer whose window-displays, price-tickets or advertisements feature resale at prices below the supplier's resale prices.

[8] Restrictions (*b*) and (*e*) in s. 6 (1) of the Act.

It may be said that it is desirable that individual manufacturers should be given discretion in deciding whether and when to take action against a particular price-cutting trader. This may be said to allow greater flexibility in the distributive trades and so reduce one of the adverse effects of thoroughgoing price maintenance. The Monopolies Commission argued, in part, along these lines when criticising collective enforcement which removed such discretion from manufacturers.[11] But the exercise of such discretion is essentially

[9] Before the Act came into force, it might sometimes have been difficult to establish whether a manufacturer had been seriously attempting to discipline price-cutters, particularly when the price-cutters could obtain supplies of his brands from wholesalers. Even a collective-enforcement association might have some difficulty in stopping up all sources of supply. But under the " non-signer " provision of the Act, the remedial measure is both simple and effective; and failure to use it cannot be concealed from interested parties.

[10] The point in question has not arisen in the proceedings under s. 25 of the Act to date. It may be noted, however, that United States courts have generally been reluctant to accept the defence, by price-cutters, of abandonment of resale price maintenance (" fair trade ") because of lack of vigorous enforcement. But in a few cases preliminary injunctions against cutters have been denied because of evidence of non-enforcement, *e.g.*, when the evidence showed that the manufacturer had delayed in seeking judicial aid and that catalogue houses were listing the articles at cut prices.

[11] *Collective Discrimination*, paras. 170 and 175.

discriminatory and inequitable as between traders; and it adds to business uncertainties. It seems inappropriate that the courts should be required to support such practices.

Even if it is granted that the supplier implicitly accepts a restriction, a price maintenance condition or agreement would not be registrable when it comes within the scope of section 7 (2) of the Act, which, in general terms, exempts otherwise registrable agreements or arrangements when the restrictions relate " exclusively to the goods supplied . . . in pursuance of the agreement " and when the restrictions are not accepted " as between two or more persons by whom, or two or more persons to or for whom, goods are to be supplied . . . in pursuance of the agreement." [12] Prima facie this provision would appear to exempt all supplier-dealer agreements or arrangements for the maintenance of resale prices. But two situations call for comment.

The first refers to agreements or resale stipulations which relate to other matters besides the resale prices of the supplier's goods. In trades in which retail sales often involve part payment in the form of trade-ins, the supplier may wish to prevent barely concealed price-cutting by the reseller by stipulating the maximum prices that may be paid for various brands and vintages of trade-ins. Where this is done, a resale price maintenance agreement or arrangement restricts the reseller both as to the prices at which he sells the supplier's goods and also as to the prices at which he buys other goods. The second of these restrictions does not relate " exclusively to the goods supplied " within the apparent meaning of section 7 (2). To that extent the exemption would appear to be inoperative. Similarly, a supplier may limit the type and amount of " free " service (*e.g.*, guarantees, installation, repairs and maintenance) which the reseller gives with the resale of his goods, since otherwise there is scope for indirect price competition. Since a limitation of this kind in effect requires the dealer not to " sell " these services free (or sometimes not below cost), it is arguable that some term in the agreement does not relate solely to the goods in question. It may be argued, however, that this aspect of a resale price maintenance agreement should be ignored since restrictions affecting the supply of services (as distinct from goods) are not affected by the legislation in the sense that they are not registrable; but this does not appear to be envisaged in the wording of section 7 (2).[13]

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[12] Even when they are so accepted, the agreement is not registrable if the restrictions in it have been accepted in pursuance of a previous agreement in respect of which particulars have been registered under the Act (s. 7 (2)). The full text of s. 7 (2) is:

" (2) In determining whether an agreement for the supply of goods or for the application of any process of manufacture to goods is an agreement to which this Part of this Act applies, no account shall be taken of any term which relates exclusively to the goods supplied, or to which the process is applied, in pursuance of the agreement:

Provided that where any such restrictions as are described in subsection (1) of section six of this Act are accepted as between two or more persons by whom, or two or more persons to or for whom, goods are to be supplied, or the process applied, in pursuance of the agreement, this subsection shall not apply to those restrictions unless accepted in pursuance of a previous agreement in respect of which particulars have been registered under this Part of this Act."

The second situation concerns a price-maintaining manufacturer who also operates as wholesaler (and/or retailer) of his own (and possibly other suppliers') goods. Resale price maintenance arrangements of such a vertically integrated firm in fact have the effect of a horizontal price agreement between the manufacturer, in his capacity as wholesaler, and his wholesaler customers in their capacity as reselling wholesalers. This is so where the manufacturer, in tying the hands of a wholesaler-customer as to (wholesale) resale price, implicitly undertakes to tie his own hands as a competing wholesaler. The grounds for arguing that the manufacturer implicitly accepts such a restriction are analogous to those stated in another context on p. 360 above[14]; and it is of interest that courts in the United States have sometimes refused to enforce vertically-integrated manufacturers' resale price arrangements on the grounds that they contain an element of horizontal price-fixing which contravenes the general anti-trust legislation in a way not sanctioned by the so-called fair trade legislation.[15]

[13] It may be noted that in branches of distribution in which trade-ins or "free" services are serious problems, the manufacturers in the industry would probably have entered into a registrable collective agreement codifying their resale terms and conditions; this would be registrable, and in due course come up for examination by the Restrictive Practices Court (see s. 2, below). In such a case the exemption noted in the preceding footnote would cover resale price agreements made pursuant to the collective agreement. But should such a collective agreement be terminated by order of the court, this particular ground for exemption from registration would disappear.

Restrictive conditions imposed on resellers as to trade-ins are enforceable by legal proceedings against non-signers (s. 26 (1) of the Act). This does not seem to apply to restrictive conditions as to "free" services, unless, as is unlikely, the supplying of these services falls within the scope of the term "discount," restrictions on which are enforceable (s. 26 (1) of the Act).

[14] It is worth noting, however, that in *Livock* v. *Pearson Bros.* (1928) 33 Com.Cas. 188, it was held that a manufacturer was not restrained from selling to the public at less than the list-prices (resale prices) stipulated in his dealings with middlemen; that is, the court held that there was no implication of a contractual term that he would observe these prices in his own sales direct to the public. *Quaere*, whether the court would have restrained a price-cutting middleman in the circumstances?

Some U.S. courts have refused to assist manufacturers with the enforcement of fair trade arrangements when it has been established that they were under-selling wholesalers subject to the arrangements; *e.g.*, an injunction against a price-cutter was denied where a manufacturer gave a 20 per cent. discount to retailers but permitted wholesalers to resell only at set prices less not more than 2 per cent. discount: *Ciba Pharmaceutical Products, Inc.* v. *Towns & James, Inc.* (D.C. N.Y., 1954), 1954 C.C.H. Trade Cases, 67,826.

[15] The leading cases include: *U.S.* v. *McKesson and Robbins, Inc.* (76 S.C. 937 (1956)); *Esso Standard Oil Co.* v. *Secatore's Inc.* (D.C. Mass., 1956), 1956 C.C.H. Trade Cases, 68,547.

Now if it were accepted that the manufacturer, *qua* wholesaler (or retailer), accepts a restriction as to selling price, could it be held, further, that the restrictions accepted implicitly by the manufacturer and explicitly by a wholesaler-customer are restrictions which " are accepted as between two . . . persons by whom . . . goods are to be supplied " in pursuance of the price-maintenance agreement? For if this is held to be so, the agreement between them would not fall within the scope of the exempting section 7 (2). Both parties, the manufacturer and the wholesaler, seem to be persons " by whom goods are to be supplied " to retailers, and the terms of this supplying are governed by the agreement. But the term " supply " in the context is certainly not unambiguous.

The idea that resale price maintenance, a vertical price control, has the effects of horizontal price controls, is of more general significance. Historically, the demand by organised retailers for resale " price protection " from their manufacturer-suppliers often arose, or was intensified, when their horizontal price agreements had failed or were expected to fail because of internal lack of discipline or the presence of external competition. When sufficient manufacturers had adopted price maintenance in any branch of retail trade, this practice secured the same desired results, but much more effectively, in favour of those retailers who were desirous of eliminating or moderating price competition. Today, horizontal price agreements or arrangements, however ineffective, are registrable; but vertical price agreements or arrangements, which in many cases are more effective than any horizontal price fixing could be in the same circumstances, are not registrable. This is not to argue that they should be registrable, but that the situations created by them should, perhaps in other ways, be examined as systematically and as carefully as horizontal price agreements will be examined by the Restrictive Practices Court.[16]

2. REGISTRABLE AGREEMENTS AFFECTING RESALE PRICE MAINTENANCE

Though manufacturers' individual price maintenance agreements and arrangements may not be registrable, and not subject to adjudication by the new Restrictive Practices Court, the issue of resale price maintenance will nevertheless come up in hearings before this court. This is so because certain collective agreements among suppliers affecting their individual resale price maintenance arrangements are registrable, and these will in due course be the subject of proceedings. In this article two kinds of agreement are considered by way of illustration. The first is an agreement among competing suppliers of a class of goods whereby each undertakes to have resale price maintenance arrangements and to enforce them (perhaps with the aid of some collectively provided service to detect price-cutting offenders and with recourse to a fund to meet the costs of parties taking proceedings against price-cutters). The second is an agreement whereby each of a number of suppliers undertakes to follow a uniform and specified definition of price-cutting (*e.g.*, controlling "free" services) and to require dealers not to allow more than specified maxima on trade-ins. Each restricts the signatories in a manner which calls for registration.[17]

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[16] It may, however, be said, in contradiction of this conclusion, that the two types of price fixing are not *in pari materia*. It may be objected, for example, that the manufacturers would aim at keeping down the gross profit margins allowed to dealers in their individual price maintenance prescriptions, whereas in horizontal price fixing the dealers would aim at raising their gross profit margins in their own interests; in short, that there is less risk with the former that dealers' gross margins will be inflated adversely to the consumers' interests. No doubt the difference is important in some cases. But in many cases the manufacturers

A registered restriction concerning resale price maintenance arrangements alone can have no economic effects except insofar as it affects the individual resale price arrangements of its participants.[18] (This is particularly clear in the case where the registered agreement merely calls for the participant suppliers to adhere to certain definitions of price-cutting in respect of those products which they choose to price-maintain. Here the registered restriction, without price maintenance, obviously can have no economic effects.) The restriction may make these individual arrangements more effective (*i.e.*, close up loopholes for price-cutting by resellers more effectively), or it may make them more comprehensive by binding the parties to have price maintenance and to enforce it. An attempt to justify the registered restriction would, therefore, apparently have to proceed by way of argument to establish that the participants' individual resale price maintenance arrangements collectively have effects which meet the statutory tests.

may aim at securing greater support from those dealers who favour price fixing by raising gross margins competitively; and, in any case, organised dealers sometimes are able to press effectively for higher gross margins. Moreover, the possibility of the inflation of gross margins in horizontal price agreements among dealers is usually limited by the absence of sanctions, whereas the gross margins under resale price maintenance can be effectively enforced by the suppliers.

[17] *Quaere*, whether the arrangement is registrable when a number of manufacturers agree to contribute to a fund available to defray the costs of taking action against price-cutters, but do not bind themselves in any way either to have resale price maintenance on some or all of their goods or to enforce such stipulations as they choose to have?

[18] Where the restriction concerning resale price maintenance is part of a larger group of restrictions, it is arguable that some suppliers accept some of the other restrictions not because they favour them but because they wish to participate in the price maintenance arrangements. Here the restriction concerning price maintenance may be said to have a wider effect.

It thus seems likely that, in the adjudication of these registered restrictive agreements, the Restrictive Practices Court will be involved in the assessment of the unregistered individual resale price maintenance agreements to which the registered agreements are ancillaries or supplements. But, though this is likely, it is not certain in all cases. Thus, where the court is satisfied that the removal of the registered restriction would not affect the practice of resale price maintenance in any way, it may presumably order its removal on the grounds that it has no effect and cannot therefore be held to be justified on any of the seven grounds listed in section 21 of the Act (" Presumption as to the Public Interest "). But this seems to be an unimportant consideration, and one imagines that such agreements would have been avoided unless they were considered necessary either for extending the scope or for improving the enforcement of individual resale price maintenance arrangements. The more important possibility which presents itself is that the court may regard as closed the question of the merits of resale price maintenance. This line might be taken on the grounds that the legislature, in Part II of the Act, has made provision for facilitating the enforcement of resale price maintenance, which may be taken to imply an approval of the practice.[19] And if this line were taken, that is that resale price maintenance, when voluntarily adopted by the supplier, is desirable, the court might presumably hold that there is a presumption in favour of the facilitating agreements, strong enough to upset the general presumption in section 21 that restrictive agreements are against the public interest.[20]

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[19] In this connection the observations of the Monopolies Commission in its *Report on the Supply of Tea*, 1956, published after the enactment of the 1956 legislation, are of interest. The Commission seem to have taken the view that, in the absence of special circumstances, the Act of 1956 sets up a presumption that individual resale price maintenance does not operate against the public interest:

" The Restrictive Trade Practices Act, 1956, provides for the individual enforcement by legal proceedings of conditions as to resale prices. It is nevertheless our duty to consider whether resale price maintenance has been used in such a way as to be contrary to the public interest. We have considered this question in the light of the evidence set out in paragraphs 147–153. We have found no special circumstances or practices in the tea trade which would distinguish it from other trades in this respect. We *therefore* find that, in the tea trade, individual resale price maintenance does not operate, nor may it be expected to operate, against the public interest." (Para. 171, italics added.)

In view of the wide variety of circumstances in which resale price maintenance is practised (*e.g.*, structure of industry, coverage of practice) and the variations in the practice itself (*e.g.*, effectiveness of enforcement, treatment of patronage dividends, level of maintained gross margins), it is not clear what the Commission meant by special distinguishing circumstances in the context. In fact, the practice in the tea trade is distinguished from its counterpart in many other trades by the fact that two of the major suppliers do not enforce their resale prices at all rigorously (para. 150).

[20] Generally, the proper relationship between Parts I and II of the Act is not clear. For example, if the Restrictive Practices Court orders the discontinuance of a registered restriction affecting price maintenance on the grounds that the price

However, this line of approach raises difficulties. The court must be satisfied of the presence of one or more of the seven " circumstances " enumerated in section 21 before it can set aside the presumption that the restriction is against the public interest. Hence, insofar as the registered restrictions are to derive their justification from the merits, in the public interest, of the practice of individual resale price maintenance, these merits will have to be translated into terms of the seven cardinal virtues catalogued in section 21. It is difficult to see how this process can fail to call for an examination of the merits and demerits of resale price maintenance in the industry in question. More precisely, it would seem to call for an examination of the merits and demerits of the increase in coverage or the improvement in enforcement of resale price maintenance achieved by the registered restriction; but this would seem to involve an examination of the merits and demerits of resale price maintenance itself. If this conclusion is correct, the court will indeed be probing into the effects of unregistered agreements or arrangements and applying the tests laid down in section 21.

The justification in terms of section 21 of registered restrictive agreements affecting resale price maintenance cannot be considered here, if only because this would involve a detailed consideration of the economic effects of resale price maintenance. Two general points, however, may be made.

The first point refers to the interpretation of section 21 of the Act. This section distinguishes seven types of circumstances in which the Restrictive Practices Court may find that a particular registered restriction is not against the public interest (provided always that the established advantages of the restriction outweigh its detrimental effects). This would not call for comment here but for the phraseology employed in section 21 (1). In the wording of category (b)—one of the seven grounds for justification—it is specifically stated that the restriction is not against the public interest if the court is satisfied that specific and substantial benefits accrue to the public " whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom." This, in the present

maintenance in question is against the public interest in terms of Part I, would the courts be required to come to the assistance of a supplier in the industry seeking to enforce his individual resale stipulations under s. 25 of Part II? The sole statutory provision is that s. 25 does not apply in respect of a resale condition " imposed in pursuance of any restriction which is declared by an order of the Restrictive Practices Court . . . to be contrary to the public interest " (s. 25 (3)). But this does not cover the case where a prior restriction has been duly abandoned, but some or all of the suppliers proceed with their own price maintenance arrangements individually. Should the courts, in exercising their discretion, give weight to the Restrictive Practices Court's expressed or implied assessment of resale price maintenance in the particular industry?

context, would seem to cover benefits from non-registered " arrangements," such as resale price maintenance, affected by the registered restriction. But it is at least debatable whether the resale price maintenance arrangements can be said to " result " from the registered restriction [21]: is it not more realistic to say that the registered restrictions result from the practice of individual resale price maintenance? It is perhaps more important that the form of words quoted above does not appear in section 21 for any of the other six categories of justification. It is not at all clear whether this omission should be interpreted to mean that, to qualify for the protection in terms of these other categories, the promotion of the public interest in the specified ways must derive in some sense more *directly* from the registered restriction itself and not from " resulting " " arrangements and operations." A broad interpretation of section 21 suggests that this distinction should not be made; the terminology employed, however, raises a doubt.[22]

A comment on section 21 (1) (*g*) is relevant here. In general terms this makes it possible for one registered restriction to be justified in its role as a support for another restriction in respect of which the court has found favourably. It does not matter whether this second restriction is registered or not. But the provision requires that the second restriction is one " accepted by the parties [to the first restriction], whether under the same agreement or under any other agreement between them." Thus the resale price maintenance agreements or arrangements made with resellers by each of the suppliers cannot qualify to serve as the second restriction in section 21 (1) (*g*); they are not between parties to the registered restriction. This limitation enhances the importance of the consideration set out in the preceding paragraph.

The second point is particularly relevant to agreements between suppliers binding them to have and to maintain resale price conditions. Several of the customary arguments in support of resale price maintenance, some of which found favour with the Lloyd-Jacob Committee, are to the effect that, in the absence of resale price maintenance, retail competition works to the disadvantage of the manufacturer of branded goods, and (by direct statement or by implication) that this is against the interests of consumers.[23] The strength of these arguments need not be considered here.[24] But it is submitted that such arguments would not be relevant if advanced in favour of a registered collective agreement providing for the introduction and enforcement of resale prices by a group of manufacturers. This is so because, if the particular arguments were valid, each manufacturer would find it profitable to have and enforce resale price stipulations even in the absence of any agreement with his competitors, and, indeed, would find it particularly profitable to do so when some or all his competitors refrained from following his example. No agreement would be necessary in the postulated circumstances.

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[21] Historically, the horizontal arrangements between manufacturers in connection with price maintenance have followed experience by individual firms with price maintenance arrangements.

[22] Albery and Fletcher-Cooke (*Monopolies and Restrictive Trade Practices*, 1956, p. 47) comment on the words in question that " they are probably inserted only *ex abundanti cautela*. . . . They merely show that the causal connection between the restriction and the benefits is to be approached generously in favour of the parties seeking to justify." But the question is whether the omission of the words in the other categories means that the causal connection between the restriction (or the removal of the restriction) and the benefits (or the adverse results) is to be approached more rigorously and less generously.

This consideration would seem to restrict the relevance of some of the traditional arguments for resale price maintenance (*e.g.*, the argument that retail price competition, including the use of loss-leader tactics, impairs the continuity of production of, and consumer confidence in, established brands of goods, or causes deterioration in the provision of after-sales services by dealers). It does not, however, in the same way affect the case for collective agreements relating to trade-ins, etc., where the individual supplier may otherwise have difficulty in controlling resale prices. Moreover, it does not apply, of course, to other arguments for resale price maintenance which claim that the beneficial effects of the practice only accrue to the advantage of producers and consumers when all (or most) brands or supplies of a range of goods are effectively price-maintained.[25] The strength of such arguments need not be considered here. But they would seem to be relevant in the adjudication of collective agreements when it can be further established that in the particular situation it would not be in the interests of a producer to maintain his resale prices unless his competitors were to do the same.

[23] See, for example, the points made in the last two sentences of para. 84 and in para. 112 of the *Report of the Committee on Resale Price Maintenance.*

[24] These (and other) arguments are considered in some detail in my *The Economics of Resale Price Maintenance.*

These arguments are clearly invalid when applied to a situation in which no manufacturer would price-maintain his brands unless his competitors followed suit, since these particular advantages of resale price maintenance are supposed to be in his individual interests as well as in the interests of consumers. Both the history of resale price maintenance and recent developments in both this country and the United States suggest that this type of situation is not uncommon.

[25] Thus it is sometimes said that widespread resale price maintenance leads to a larger number of retail outlets, or that it produces greater stability in the relevant branch of the distributive trade. The achievement of these results (and the benefits to producers and consumers which are said to flow from them) require that all or most of the suppliers of the goods in question practise price maintenance.

3. THE MONOPOLIES COMMISSION AND THE INVESTIGATION OF RESALE PRICE MAINTENANCE

There are two types of situation involving resale price maintenance in the home market which may be referred by the Board of Trade to the Monopolies Commission for investigation.[26] The first is the so-called single-firm monopoly situation in which one firm supplies (or purchases) at least one-third of the goods in question. The second type of situation is present where two or more firms together supply at least one-third of the goods in question and, " whether voluntarily or not, and whether by agreement or arrangement or not, so conduct their respective affairs as in any way to prevent or restrict competition in connection with the production or supply of [the] goods . . . in question (whether or not they themselves are affected by the competition and whether the competition is between persons interested as suppliers or producers or between persons interested as customers of suppliers or producers)." [27] Now individually administered and enforced resale price maintenance agreements or arrangements restrict competition between customers of the manufacturers or suppliers. Hence monopoly conditions of the second type prevail in the supply of a particular description of goods where manufacturers who in the aggregate supply at least one-third of the goods in question practise individual resale price maintenance.[28] This is so even where the resale price restrictions themselves cover less than one-third of the goods.[29]

In a full reference to the Monopolies Commission by the Board of Trade, the Commission is required to report in what manner and to what extent monopoly conditions prevail, and on " the things which are done by the parties concerned as a result of, or for the purpose of preserving " the monopoly conditions, and also whether the monopoly conditions or " all or any of the things done as aforesaid," operate or may be expected to operate against the public interest.[30] It may be observed that the relevant provision of the Act refers to monopoly " conditions," the " manner " in which they prevail, and the " things done " by the parties. It may be observed, further, that only " conditions " and " things done " are subject to appraisal by the Commission. The question is whether the practice of resale price maintenance qualifies as " monopoly conditions " or as " things done " in the two types of monopoly situation described earlier in this section.

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[26] Pursuant to Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, ss. 2 (1), 3 and 6.
For a detailed examination of the statutory definition of " monopoly conditions," see my contribution in W. Friedmann (ed.), *Anti-Trust Laws*, 1956, pp. 365–368. The point is made there that the definition is sufficiently comprehensive to bring a large number of commercial situations within the scope of the legislation.

[27] Agreements and arrangements registered under Part I of the 1956 Act are to be disregarded when determining whether monopoly conditions within the meaning of the 1948 Act (as amended) prevail. (Restrictive Trade Practices Act, 1956, s. 29 (1).)

[28] *Cf.* Monopolies Commission, *Report on the Supply of Tea*, 1956, para. 157 (iii).

[29] On this point, see the discussion in Friedmann (ed.), *op. cit.*, p. 367, n. 14, and the observations in Monopolies Commission, *Report on the Supply of Sand and Gravel in Central Scotland*, 1956, para. 189.

[30] The criteria of the public interest are set out in s. 14 of the 1948 Act; they differ from those laid down in s. 21 of the 1956 Act for the guidance of the Restrictive Practices Court.

Assume that monopoly conditions prevail solely by virtue of the practice of resale price maintenance by the required proportion of suppliers, none of whom is a single-firm monopolist in the meaning of the Act. Here the restriction on competition inherent in the practice seems to be the " manner " in which the monopoly conditions prevail. The practice of price maintenance is the heart of the matter. Thus, on a reference, the Commission would seem to be required to appraise the practice in the particular industry unless, as seems improbable but not impossible, there is a necessary distinction between the " manner " in which the conditions prevail and the " conditions " themselves.

In the postulated situation it would be unreasonable to hold that resale price maintenance is a " thing done " as a result of, or for the purpose of preserving, the monopoly conditions. The conditions, in fact, result from the practice, and not vice versa.[31] And while it is true that the practice of price maintenance " preserves " the monopoly conditions in the sense that the disappearance of the former means the dissolution of the latter, this interpretation of the word can scarcely be the intended one; one imagines that the intention was to cover practices such as full-line forcing, exclusive dealing or selective price-cutting which, in circumstances postulating a high degree of market control by a dominant firm, may materially limit the access of competitors to a market.

The position is different where monopoly conditions prevail solely because one firm supplies at least one-third of the goods in question. If this dominant firm is the only firm practising resale price maintenance, this restriction of competition as between its customers is not the " manner " in which monopoly conditions are constituted, and the conditions would persist even if the firm abandoned the practice. It seems that the Commission is enabled to bring price maintenance within the scope of its inquiries and assessment in such a situation only if it is held that the practice in the circumstances is one of " the things which are done by the parties concerned as a result of, or for the purpose of preserving," the monopoly conditions.[32] But it would hardly ever—in fact probably never—be realistic to hold that resale price maintenance is practised because of a dominant monopoly position in the market, or alternatively, in order to maintain such a market position. A monopolist generally gains no special advantage in the market by having resale price maintenance. If it should give him a material advantage over his competitors, any competing supplier, however small or newly established, can neutralise this advantage by also practising price maintenance.[33] (Part II of the 1956 Act provides such competitors with an effective method of enforcement. Before the Act, collective enforcement associations often were available for the purpose.) The monopolist strengthens his position only to the extent that the guaranteeing of gross margins to distributors and the enforcement of resale prices are expensive, and that the expense bears more heavily on a small or new firm than on an established large one. But recourse to this line of reasoning would appear to be stretching the meaning of the words in the Act beyond breaking-point. Again, it would be rare to find that resale price maintenance by a dominant firm has occurred as a result of the development and emergence of its dominant position. Resale price maintenance has been introduced in a variety of circumstances and in industries with a wide range of market structures; but it is doubtful whether it has ever been introduced by a dominant firm as a result of a monopoly market structure.

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[31] However, it might be said that once suppliers supplying more than one-third of the market have adopted resale price maintenance (thus creating monopoly " conditions "), other suppliers would find it expedient *as a result* to follow suit. (Historically, there was a snowballing effect in the growth of the practice in several industries.)

The discussion in the preceding paragraph deals with a situation which is unlikely to be important in practice. Unless the " description of goods " is made far narrower than has been the practice of the Board of Trade to date, it will be unusual to find situations in which the dominant firm, and the dominant firm alone, is practising resale price maintenance, so that the other definition of monopoly conditions will also be satisfied, which, as we have seen, seems to permit the practice to be examined and assessed.

The preceding discussion of the two types of situation is also relevant for *general* inquiries by the Monopolies Commission under section 15 of the 1948 Act. It is interesting that it has already been suggested, in public discussion, that a *general* inquiry may be the best method for probing into the widespread practice of resale price maintenance if the advice of the Cohen Council were to be accepted by the government.

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[32] Of course, if any other supplier also had resale price restrictions, the other criterion is also satisfied, and the conclusions in the previous paragraphs in the text apply.

[33] To the extent that some distributors prefer to set their own resale prices, a policy of resale price maintenance by a dominant supplier may well ease the way of fringe competitors who prefer not to make resale stipulations.

Section 15 (1), as amended by section 29 (5) of the 1956 Act, reads:

> "The Board of Trade may at any time require the Commission to submit to them a report on the general effect on the public interest of practices of a specified class, being practices which in the opinion of the Board are commonly adopted as a result of, or for the purpose of preserving, conditions to which this Act applies."

Does resale price maintenance qualify for inclusion within the scope of this provision? In the preceding discussion of the single-firm monopoly situation it was suggested that it is most uncommon for resale price maintenance to result from market dominance or to contribute, save possibly incidentally and to a minor extent, to the preservation of market dominance. The earlier discussion of the other type of statutorily defined "monopoly" situation created by the practice of resale price maintenance referred to other difficulties. It was suggested that the independent practice of resale price maintenance by a number of non-dominant firms can scarcely be said to be a practice adopted "for the purpose of preserving monopoly conditions," except in the narrowly technical sense that in certain situations the statutory definition of monopoly conditions will be satisfied only because there is resale price maintenance. Moreover, resale price maintenance cannot realistically be said to have been adopted as a result of this type of monopoly condition.[34]

It is not my contention that the Monopolies Commission should not be enabled to make a general inquiry into the practice of resale price maintenance. But for this, or for a similar purpose, the wording of section 15 is rather unfortunate[35]; it would have been better (and more in accord with legislative intention?) if the section had referred straightforwardly, for example, to "practices of a specified class which are commonly adopted and which restrict, or may be expected to restrict, competition."

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[34] But see above, note 31.

[35] Under s. 2 (2) of the Act the Board of Trade may also call on the Commission to give information and assistance to the Board "in relation to any question connected with conditions to which this Act applies." This wording avoids the difficulties raised by s. 15, but the provision presumably does not extend to full-scale inquiries such as are required under ss. 2 and 15.

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This digest, which has been compiled by the Editor, covers the period from July 1, 1958, to September 30, 1958.

UNITED KINGDOM

AGRICULTURE

Regulation

The Agriculture Act, 1958 (6 & 7 Eliz. 2, c. 71), received the Royal Assent on August 1, 1958. Section 1 repeals the powers contained in Part II of the Agriculture Act, 1947, to make supervision orders, to give directions and to dispossess owners on grounds of bad husbandry and provides for all existing orders to be removed from registers of local land charges; corresponding provisions are made for Scotland. Section 2 amends the provisions of section 8 of the Agricultural Holdings Act, 1948 (and the corresponding provisions in Scotland), as to the fixing of rent of an agricultural holding which shall be the open market rent and so that the effect on rent of the tenant being in occupation of the premises is disregarded. Section 3 transfers from the Minister to Agricultural Land Tribunals on a day to be appointed, the giving or withholding of consent to the operation of notices to quit agricultural holdings and the granting of certificates of bad husbandry. Section 4 gives tenants after a day to be appointed the right to be provided with certain fixed equipment necessary to comply with statutory requirements at the expense of landlords on paying increased rents. The Lord Chancellor is to perform the functions given with respect to Agricultural Land Tribunals to the Minister by section 73 of the Agriculture Act, 1947 (s. 5). Section 6 provides for succession to Scottish holdings. Section 7 amends the law and increases penalties in respect of offences relating to injurious weeds. Section 8 contains minor and consequential amendments with respect to Agricultural Land Tribunals, certificates of bad husbandry, agreements as to permanent pasture and the Landlord and Tenant Act, 1954. Section 9 is an interpretation section. Section 10 contains repeals, savings and transitional provisions.

The Act, except for section 4, extends with modifications to Scotland, but with the exception of section 8 (2) does not extend to Northern Ireland.

Except for sections 3, 4 and the repeals in Part 2 of Sched. II the Act came into force on August 1, 1958.

See also TOWN AND COUNTRY PLANNING (below, p. 406).

COMPULSORY PURCHASE

Compensation

Regulations have been issued reducing from 7 per cent. to 6¼ per cent. per annum the rate of interest payable where entry is made, before payment of compensation, on land in Scotland which is being purchased compulsorily (S.I. 1958 No. 1133).

Regulations have been issued reducing from 7 per cent. to 6¼ per cent. per annum the rate of interest payable where entry is made, before payment of compensation on land in England and Wales which is being purchased compulsorily (S.I. 1958 No. 1134).

COURTS

Statistics

Civil judicial statistics for Scotland relating to the House of Lords, Court of Session, Sheriff Courts and other civil courts, licensing courts, certain legal and public departments, bankruptcy, court fees and fees taken in the Departments for 1957, have been published (Cmnd. 478).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Arts

The Treasury has issued a pamphlet on Government and the Arts in Britain describing the scope and extent of Government assistance (H.M.S.O. No. 63–158). Total Government expenditure on the arts in 1958–59 is estimated to amount to well over £6 million, which compares with expenditure of between £900,000 and £1 million in 1938–39 and in 1945–46. Of the estimated total in 1958–59, nearly £3 million is the cost of the 16 major art museums, galleries and libraries which are financed almost entirely by the Exchequer; £1·1 million is the amount of the grant to the Arts Council (compared with £235,000 in 1945–46); and over £1·1 million is expenditure on preserving historic houses and their contents.

Civil Service

Report of the Civil Service Commissioners for 1957–58 has been published (H.M.S.O. 25–1–0–58).

Defence

Central organisation. Changes in the United Kingdom central organisation for defence which were announced at the beginning of 1957 have now been formalised, and, in addition, three new features have been introduced. Details of the changes are given in a White Paper published on July 15, 1958.

In a statement in the House of Commons on July 15, the Prime Minister said: " When the present Government was formed . . . the Minister of Defence was entrusted with the task of reshaping and reorganising the armed forces in accordance with current strategic needs and in the light of the economic capacity of the country. For this purpose, I redefined the Minister's functions in relation to the Service Departments and the Ministry of Supply, and gave him increased authority to take decisions on matters of general defence policy affecting the size, shape, organisation and equipment of the armed forces. I announced this to the House on January 24, 1957. These arrangements have now been in operation for eighteen months. As a result of recent careful review, the Government have concluded that they have been justified by practical experience, and that, subject to certain minor alterations, they should now be formally confirmed. In addition, three new features are being introduced. First, the composition and operation of the Defence Committee of the Cabinet is being adjusted in order to secure greater flexibility and efficiency. Secondly, a defence board is being set up to assist the Minister of Defence in formulating defence policy and for dealing with inter-Service problems. Thirdly, certain adjustments are being made in the Staff organisation, including the assumption by the Chairman of the Chiefs of Staff Committee of the title of Chief of the Defence Staff. The Queen has been graciously pleased to approve that Marshal of the Royal Air Force Sir William Dickson be appointed to this new office."

The following is a summary of the main points in the White Paper.

" The supreme responsibility for national defence," in the words of the White Paper, " rests with the Prime Minister and the Cabinet. Subject to this, defence problems which engage the collective responsibility of the Government—especially those which are related to the Commonwealth and to foreign and colonial policy—are normally handled on the Cabinet's behalf by the

Defence Committee, which meets under the chairmanship of the Prime Minister. Experience has shown that, in view of their wide range and variety, these problems cannot, conveniently, be handled by a committee of fixed membership. Therefore, in order to gain greater flexibility, the committee is now being so constituted as to allow the various types of problems which arise to be considered by the Ministers most directly concerned with them." The members of the Defence Committee, under the chairmanship of the Prime Minister, will be the Home Secretary, the Foreign Secretary, the Chancellor of the Exchequer, the Commonwealth Secretary, the Colonial Secretary, the Minister of Defence, the Minister of Labour and National Service, the three Service Ministers and the Minister of Supply. The Prime Minister will determine which of these members should attend particular meetings of the committee, according to the subjects to be discussed and the ministerial responsibilities involved. In addition, other Ministers may be invited to attend meetings when matters affecting their Departments are to be discussed. Papers and minutes of the meetings will be circulated to all members of the committee. The Chiefs of Staff will attend Defence Committee meetings and, in addition, may be invited to attend meetings of the full Cabinet.

The Minister of Defence has authority to decide (subject to the responsibilities of the Cabinet and the Defence Committee) all major matters of defence policy affecting the size, shape, organisation and disposition of the armed forces, and their weapons and war-like equipment and supply (including defence research and development). He is also ministerially responsible to the Prime Minister for the execution of military operations approved by the Cabinet or the Defence Committee. Recommendations for the more important Service appointments are submitted by the Service Ministers and the Minister of Supply for the approval of the Minister of Defence, who, in appropriate cases, seeks the covering approval of the Prime Minister. The Service Ministers, working through the Board of Admiralty and the Army and Air Councils, are responsible for the efficiency and administration of the three Services. The Minister of Supply, similarly, is responsible for the efficient execution of approved programmes of defence research development and production. In deciding major matters of policy, the Minister of Defence consults with the Service Ministers and the Minister of Supply. A defence board is being established for the purposes of such consultation and for the discussion of inter-Service problems. The board's membership will include the Minister of Defence (chairman), the Service Ministers, the Chiefs of Staff, and the Permanent Secretary and the Chief Scientist of the Ministry of Defence.

The new post of Chief of the Defence Staff has been created, and the existing combined post of Chairman of the Chiefs of Staff Committee and Chief of Staff to the Minister of Defence has been abolished. The Chief of the Defence Staff will be responsible to the Minister of Defence and be his principal military adviser. The Chief of the Defence Staff, together with the Chief of the Naval Staff, the Chief of the Imperial General Staff and the Chief of the Air Staff, form the Chiefs of Staff Committee, of which the Chief of the Defence Staff will act as chairman. The committee is collectively responsible to the Government for professional advice on strategy and military operations, and on the military implications of defence policy generally. Its agreed collective advice will be tendered to the Minister of Defence by the Chief of the Defence Staff, and, where there are differences between the Chiefs of Staff, the Chief of the Defence Staff will tender his own advice as well as report the views of the other members of the committee. The Chiefs of Staff of the three Services have, at all times, a right of access to the Minister of Defence, and, when necessary, to the Prime Minister, whether on operational or other military matters. The Joint Planning Staff, which hitherto has been responsible to the Chiefs of Staff collectively, is now to be directly responsible to the Chief of the Defence Staff. The Chief of the Defence Staff is entitled to call on the respective Chiefs of Staff to make available, to assist him in his functions, the services of the Naval, General and Air Staffs, which are together regarded as forming a Joint Defence Staff.

(The above summary is based on Commonwealth Survey, C.O.I., July 22, 1958; see Cmnd. 476; 591 H.C. Deb. 1016–19, July 15, 1958.)

Contracts. The Defence Contracts Act, 1958 (6 & 7 Eliz. 2, c. 38), received the Royal Assent on July 7, 1938. This Act replaces certain emergency provisions relating to the use of patented inventions and registered designs for the services of the Crown for defence purposes and provides for their use for similar purposes by the governments of allied or associated countries or the United Nations.

Section 1 (1) substitutes a new subsection for the existing subsection (6) of the Patents Act, 1949, s. 46, and defines the words "for the services of the Crown" to include the supply of the government of any country outside the United Kingdom, in pursuance of an agreement, of articles required for the defence of that country or of any other country with which H.M. Government has a defence agreement and the supply in pursuance of an agreement made by H.M. Government of articles necessary to enforce a resolution of the United Nations to the armed forces of the United Nations or of any nation belonging thereto. Section 1 (2) gives statutory authority to the present practice under which, where the Crown makes use of patented inventions, and registered designs, payment is made for the use of models, documents and information relating thereto. Section 1 (3) makes it clear that nothing in the Patents Act, 1949, s. 47, authorises the disclosure to the Government or any other person of any such model, document or information in contravention of any such licence or agreement as is therein mentioned. Section 1 (4) applies the foregoing provisions of the section to registered designs. Section 2 provides for the use by government contractors, for the purposes of the production of defence materials, of technical information in their possession which is protected by contractual arrangements free from any restriction imposed by agreement and free from obligation to make payments for such use when so authorised. Section 2 (2) provides that authorisation of such use shall be in writing and the following subsections define the scope and effect of such an authorisation. Section 3 lays down the procedure to be followed in respect of a grant of such an authorisation and provides that, before authorisation, the person to be authorised shall be required to treat with persons adversely affected by the authorisation. Section 4 makes provision for compensation and for the determination of disputes by a judge of the High Court selected by the Lord Chancellor in the manner provided by the Patents Act, 1949, s. 84 (1). Section 5 provides for the defraying of expenses incurred under sections 1, 4 of the Act. Section 6 is an interpretation section. Section 7 brings to an end the current period of emergency for the purposes of the Patents Act, 1949, s. 49, and the Registered Designs Act, 1949, Sched. I, para. 4, and revokes the Defence (Patents, Trade Marks, etc.), Regulations, 1941 (No. 1780), the Patents (Extension of Period of Emergency) Order, 1957 (No. 2062) and the Registered Designs (Extension of Period of Emergency) Order, 1957 (No. 2061). Section 7 (2) (3) continues in force authorisations made under this emergency legislation.

The Act, so far as it amends the Patents Act, 1949, may be cited with it as the Patents Acts, 1949 and 1958, and, so far as it amends the Registered Designs Act, 1949, may be cited with that Act as the Registered Designs Acts, 1949 and 1958.

The Act extends to the Isle of Man and to Northern Ireland. The Act came into force on August 7, 1958.

Land powers. The Land Powers (Defence) Act, 1958 (6 & 7 Eliz. 2, c. 30), received the Royal Assent on July 7, 1958, and came into force on the same date. The Act revokes certain Defence Regulations granting wide powers to Her Majesty's Government relating to land which are no longer necessary in peace time and replaces them with new powers in relation to manoeuvres, defence training, the use of sea areas for defence and like matters. Section 1 (1) revokes the following Defence (General) Regulations, 1939, so far as they then remain in force from December 1, 1958: reg. 50 (power to do work on land), reg. 51 (taking possession of land), reg. 51A (power to work minerals), reg. 52 (use of land for purposes of H.M. Forces), reg. 85 (entry upon, and inspection of, land). Section 1 (2) declares that for all the remaining purposes of the Requisitioned Land and War Works Act, 1945, the war period will end on December 31, 1958. The power to stop up highways under section 2 (1) of the Supplies and Services (Defence Purposes) Act, 1951, will not be exercisable after December 31, 1958. Sections 2–5 and Sched. 1 amend the existing statutory provisions as to manoeuvres contained in the Military Manoeuvres Acts, 1897 and 1911. By section 2 at least two months before any order in council authorising manoeuvres is made a draft must be laid before and approved by each House of Parliament and a draft must be sent to local authorities whose land is affected; the land affected and the formations intended to take part must be precisely stated in the draft order and the manoeuvres may not be scheduled to start until at least nine months after the order is made. By section 3 new provision is made as to the composition and payment of manoeuvres commissions and provision is made for setting up two separate commissions where manoeuvres are to be carried out partly in England and partly in Scotland. Section 4 gives to manoeuvres commissions new powers to make directions and regulations for the purpose of avoiding damage or disturbance in consequence of the execution of manoeuvres beyond what is necessary for the effective carrying out of those manoeuvres. Section 5 contains supplementary provisions as to the issue of directions and provides for the publication of directions in draft and for the hearing at a public inquiry of objections and representations to vary the directions. Section 6 provides for the occasional use of land for defence training purposes and for payment of compensation in respect of such use. Section 7 provides for the use of certain sea areas for defence purposes irrespective of whether or not the area abuts on land appropriated to defence purposes and extends to such areas the power to make by-laws under the Military Lands Act, 1900, s. 2 (2). By section 9 (1) power is given to the Minister of Transport and Civil Aviation to vary orders made under sections 15, 16 of the Requisitioned Land and War Works Act, 1945, in respect of highways temporarily closed which subsequently have to be closed permanently. Section 9 (2) provides for certain cases where a temporary closure order may run out before works upon the completion of which the making of a permanent closure order is conditional have been completed. Section 9 (3) (4) (5) contain minor consequential provisions. Sections 10, 11 give power to the appropriate Minister in certain cases to direct an occupier of land to remove or reduce the height of an obstruction which interferes with the approaches to an aircraft runway or with radar or radio installations or otherwise obstructs the safe use of a defence installation upon payment of compensation. Section 12 extends the provisions of the Requisitioned Land and War Works Acts, 1945 and 1948, to include certain oil pipe-lines or works accessory thereto installed or constructed under the authority of certain Ministers prior to January 1, 1959, and makes consequential provision with regard to payment of compensation and registration of rights under the Acts. Section 13 gives power to the Minister of Power to purchase land or easements over land for oil installations in manner set out in Pt. 2 of Sched. 2. By section 14 power is given to certain Ministers to make way-leave orders for oil pipe-lines and accessory works. Sections 15–18 contain supplementary provisions as to way-leave orders, the protection of pipe-lines and compensation for depreciation and damage and disturbance. By section 19 the Postmaster-General is given power to acquire land for essential defence purposes. Section 20 extends Pt. IV of the Requisitioned Land and War Works Act, 1945, to certain deep telecommunication lines constructed since February 24, 1946, to enable the Postmaster-General to maintain and use them. Section 21 contains power to enter and survey land. Section 22 abolishes the General Claims Tribunal set up under the Compensation (Defence) Act, 1939, and transfers its jurisdiction to the Lands Tribunal. Section 23 contains provisions as to service in respect of matters under the Act. Section 24 provides for regulations and orders made under the Act. Section 25 is an interpretation section. Section 26 makes provision for expenses.

The Act extends to Scotland. Sections 2 to 6 and 12 with the exception of section 2 (5) do not extend to Northern Ireland.

Inspectorate

Explosives. The 82nd report of H.M. Inspectors of Explosives for 1957 has been published (H.C. 226 of 1957–58).

Factories. The report of the Chief Inspector of Factories for 1957 has been published (Cmnd. 521).

Fire. The report of H.M. Chief Inspector of Fire Services (Counties and County Boroughs, England and Wales) for 1957 has been published (Cmnd. 499).

Prisons. The report of the Commissioners for 1957 has been published (Cmnd. 496).

Ministers' Functions

Health. The report of the Ministry for 1957, Part I, has been published and deals with National Health Service (including a chapter on international health), welfare, food and drugs, and civil defence (Cmnd. 495).

Labour and National Service. The report of the Ministry for 1957 has been published (Cmnd. 468).

Pensions and National Insurance. The report of the Ministry for 1957 has been published (Cmnd. 493).

On July 7, 1958, the House of Commons debated the work of the Ministry of Pensions and National Insurance (591 H.C. Deb. 35–156).

Transport and Civil Aviation. The report on roads in England and Wales for 1957 has been published (H.M.S.O. 55–380–0–57).

See also AGRICULTURE (above, p. 374).

Prices, Productivity and Incomes

Report. The second report of the Council (Chairman: Lord Cohen) has been published by H.M.S.O. (for terms of reference see above, p. 165).

Public Records

The Public Records Act, 1958 (6 & 7 Eliz. 2, c. 51) received the Royal Assent on July 23, 1958.

This Act gives effect to the main recommendations of the Committee on Departmental Records (Cmd. 9163) and makes certain other changes.

Section 1 places the general responsibility for public records (defined in Sched. 1) on the Lord Chancellor, who will be advised by an Advisory Council under the chairmanship of the Master of the Rolls. Section 2 provides for the appointment of a Keeper of Public Records and other persons to serve in the Public Record Office. Section 3 provides for the selection and preservation of public records; all public records created before 1660 are selected and other records selected are to be transferred to the Public Record Office before thirty years have elapsed from their creation (s. 3 (4)). Section 4 provides for the deposit of public records outside the Public Record Office in certain cases. Section 5 provides that, as a general rule, public records except those to which access is prohibited by statute (specified in Sched. 2) shall be open to public inspection fifty years after their creation. Section 6 provides for destruction of records in certain cases. Section 7 preserves the responsibility of the Master of the Rolls for the records of the Chancery of England. Section 8 makes the Lord Chancellor responsible for court records. Section 9 preserves the legal validity of public records and authenticated copies of records removed under the Act. Section 10 is an interpretation section. Section 11 revokes the Public Record Office Acts, 1838 to 1898. Section 12 provides for public records in Northern Ireland. Section 13, short title, etc.

The Act applies to records referring to Scottish affairs with the modifications in section 3 (8) and Sched. 1, para. 2 (2), and to records referring to Northern Irish affairs with the modifications in sections 3 (8), 12. The Act will come into force on January 1, 1959.

Public Works Loan Board

Report for 1957–58 has been published (H.M.S.O. 63–36–0–58).

Research

Department of Scientific and Industrial Research. The reports of the Building Research Board and the Director of Building Research, 1957; of the Radio Research Board and the Director of Radio Research, 1957; of the Road Research Board and the Director of Road Research, 1957, have been published (H.M.S.O. 47–61, 77, 153–0–57).

Medical Research Council. The report for 1956–57 has been published (Cmnd. 453).

University Grants Committee

Returns from Universities and University Colleges in receipt of Treasury grant for the academic year 1956–57, have been published (Cmnd. 477).

See also TOWN AND COUNTRY PLANNING (below, p. 406); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 407).

HOUSING

Finance

Consolidation. The Housing (Financial Provisions) Act, 1958 (6 & 7 Eliz. 2, c. 42) received the Royal Assent on July 23, 1958. Part I is entitled Financial Assistance for Housing Accommodation provided by Local Authorities and other Public Bodies. Part II is entitled Financial Assistance for Housing Accommodation privately provided. Part III is entitled Housing Accounts to be kept by Local Authorities. Part IV is general. The Act is a consolidating measure.

INQUIRIES

Collieries

Reports have been published on the explosion on November 19, 1957, at Kames Colliery, Ayrshire (Cmnd. 467), on the overwind on March 4, 1958, at Brookhouse Colliery, Beighton, Yorkshire (Cmnd. 475), and on the explosion on December 14, 1957, at Lindsay Colliery, Fifeshire (Cmnd. 485).

Factories

Report has been published on a fatal accident on August 28, 1957, in an explosives factory at Penrhyndeudraeth, Merionethshire (Report No. 253, dated December 31, 1957).

Railways

Reports have been published (a) on the collision on January 16, 1958, at Preston (dated April 18, 1958); (b) on the collision on January 30, 1958, at

Dagenham (dated June 16, 1958); (c) on the collision on December 4, 1957, at Lewisham (dated June 16, 1958); (d) on the collision on February 17, 1958, at Ince Moss (dated May 20, 1958); (e) on the collision on March 4, 1958, at Gloucester Road near Norwood Junction (dated May 30, 1958).

LOCAL GOVERNMENT

Children

In care. Particulars have been published of the number of children in care of local authorities in Scotland, under the Children Act, 1948, the manner of their accommodation, and the estimated costs of maintenance (Cmnd. 461).

Statutory amendment. The Children Act, 1958 (6 & 7 Eliz. 2, c. 65) received the Royal Assent on August 1, 1958. The Act makes further provision for the protection of children living away from their parents and amends the law relating to the adoption of children. Part I provides for the supervision of foster children by local authorities; it replaces the child-life protection provisions in the Public Health Act, 1936, the Public Health (London) Act, 1936, the Children and Young Persons (Scotland) Act, 1937, and the Children Act, 1948.

Section 1 imposes a duty on local authorities to supervise the well-being of foster children. A foster child is a child below the upper limit of the compulsory school age whose care and maintenance are undertaken for reward for a period exceeding one month by a person who is not a relative or guardian of his, but not a child whose well-being is already the responsibility of some competent authority (s. 2). A person who proposes to keep a foster child must notify the local authority (s. 3), which has power to inspect premises, impose conditions and prohibit the keeping of a child on unsuitable premises (s. 4). There is an appeal to a juvenile court against any such condition or prohibition (s. 5). Section 6 specifies certain disqualifications for maintaining a foster child. Foster children kept in unsuitable surroundings may be removed on the order of a juvenile court, or, in an emergency, on the order of a justice of the peace (s. 7). A warrant authorising a search for and removal of a child may be issued if an authorised inspector is refused access to premises (s. 8). Section 9 avoids insurances effected on the life of a foster child. Section 10 provides for sittings of juvenile courts under Part I of the Act. Section 11 gives an appeal therefrom to quarter sessions. Section 12 extends this Part of the Act to certain school children during school holidays. Section 13 extends this Part of the Act to certain children above compulsory school age. Section 14 relates to offences. Notices may be given by post (s. 15). Section 16 relates to authentication of notices. Section 17 is an interpretation section.

Part II of the Act (ss. 18–36) contains amendments of the Adoption Act, 1950, and Part III (ss. 37–41) deals with miscellaneous and general matters. The Act will come into force on April 1, 1959.

Finance

Borrowing. The rates of interest chargeable on loans advanced from the Local Loans Fund from July 12, 1958, were reduced to 6¼ per cent. for loans for more than five years but not more than fifteen years, and to 5¾ per cent. for loans for not more than five years (S.I. 1958 No. 1141, revoking S.I. 1958 No. 289).

The rates of interest chargeable on loans advanced from the Local Loans Fund from August 23, 1958, were reduced to 6 per cent. for loans for more than fifteen years and for loans for more than five years but not more than fifteen years (S.I. 1958 No. 1412, revoking S.I. 1958 No. 1141).

Rating and valuation. The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *National Deposit Friendly Society Trustees* v. *Skegness U. D. C.* [1958] 3 W.L.R. 172; *Westminster City Council* v. *London University*

King's College [1958] 1 W.L.R. 920; *Leeden* v. *Audenshaw U. D. C.* (1958) 51 R. & I.T. 362; *West London Mission of the Methodist Church Trustees* v. *Holborn B. C.* (1958) 56 L.G.R. 289, D.C.; *Royal London Mutual Insurance Society* v. *Hendon B. C.* (1958) 122 J.P. 310, D.C.

On meaning of " maintenance," " overhaul," " reconstruction " in R. & V. (Apportionment) Act, 1928, s. 3, see *London Transport Executive* v. *Betts* (*Valuation Officer*) [1958] 3 W.L.R. 239.

On meaning of " adapted for sale " in the same Act and section, see *Wilson Brothers, Ltd.* v. *Edwards* (*Valuation Officer*), *Hudson's Bay Co.* v. *Thompson* (*Valuation Officer*) [1958] 1 W.L.R. 955, C.A.

The Drainage Rates Act, 1958 (6 & 7 Eliz. 2, c. 37) received the Royal Assent on July 7, 1958. The Act amends the provisions of the Land Drainage Act, 1930, relating to the ascertainment of annual value for the purposes of drainage rates. Section 1 (1) provides that the annual value for the purposes of any drainage rate of any land which is assessed to income tax under Schedule A shall be its annual value for the purposes of Schedule A for the last year of assessment ending before the end of the period for which the rate is made. Section 1 (2) (3) provide for cases where the annual value has not been so determined and for certain cases where the annual value has never been determined. Section 1 (4) (5) (6) (7) contain consequential provisions. By section 2 (2) " drainage rate " is defined as " a rate made under Part IV of the Land Drainage Act, 1930."

The Act, does not extend to Scotland or Northern Ireland. The Act will come into force on April 1, 1959.

Litter

The Litter Act, 1958 (6 & 7 Eliz. 2, c. 34) received the Royal Assent on July 7, 1958. The Act provides that any person who deposits litter in any place in the open air to which the public have access without payment shall be guilty of an offence and be liable on summary conviction to a fine not exceeding £10, unless he was authorised to deposit such litter by the person having control of the place whether as owner, occupier or otherwise. Section 1 (2) gives specific authority to certain local authorities to institute proceedings under the Act without prejudice to the powers of any other person. The Act extends to Scotland with modifications (s. 1 (3)), but does not extend to Northern Ireland. The Act came into force on August 7, 1958.

Physical Training and Recreation

The Physical Training and Recreation Act, 1958 (6 & 7 Eliz. 2, c. 36) received the Royal Assent on July 7, 1958. The Act amends the Physical Training and Recreation Act, 1937, s. 4 (4) (which relates to contributions by local authorities towards expenses of providing and maintaining gymnasiums, playing fields, swimming baths and other facilities) by giving power to a local authority to make a loan to a voluntary organisation for meeting any such expenses where such organisation has incurred them and such expenses are properly chargeable to capital account.

This Act and the Physical Training and Recreation Act, 1937, may be cited together as the Physical Training and Recreation Acts, 1937 and 1958.

The Act applies to Scotland but not to Northern Ireland, and came into operation on July 7, 1958.

Police

Report of the Commissioner of Police for the Metropolis for 1957 has been published (Cmnd. 487).

Powers

Authority to enter. Section 287 (1) of the Public Health Act, 1936, provides: " . . . any authorised officer of a council shall, on producing, if so required, some duly authenticated document showing his authority, have a right to enter any premises at all reasonable hours . . . (*b*) for the purpose of ascertaining whether or not circumstances exist which would authorise or require the council to take any action, or execute any work, under this Act. . . ." The right of entry given by section 287 (1) (*b*) was not restricted to the premises on which work was to be executed, but included the right to enter adjoining premises for the purpose of carrying out the work.

An officer of a local authority was granted a justices' warrant to enter the appellant's premises to execute work on adjoining premises which were uninhabited and in a state of disrepair. The appellant appealed against the warrant on the ground that "premises" in section 287 was limited to premises where any work might be required to be carried out. *Held*, that the right of entry was not so restricted and the officer was entitled to enter the appellant's premises: SENIOR *v.* TWELVES (1958) 56 L.G.R. 239, D.C.

Non-feasance. A motor-cyclist, whilst riding along the highway at night, struck an unlit island which had been constructed in such a way that it projected into the highway. The motor-cyclist sustained injuries as the result of which he died. The island had been built in 1938 by the Durham County Council under the Development and Road Improvement Funds Act, 1909. In 1941 the defendant corporation took over that part of the highway, along which the motor-cyclist had been travelling, together with the island, pursuant to section 32 of the Local Government Act, 1929. The motor-cyclist's widow brought an action against the corporation for damages. *Held*, that since the defendant corporation had themselves done no positive act in relation either to the highway or to the island, and since a local authority was exempt from liability for non-feasance, the claims of the motor-cyclist's dependants and personal representatives failed.

The fact that a public highway originated as a new construction under statutory powers, as opposed to originating from dedication by some private owners, does not have the effect of preventing the exemption for mere non-feasance from extending to the highway authority for the time being responsible for its maintenance: BAXTER *v.* STOCKTON-ON-TEES CORPORATION [1958] 3 W.L.R. 275; [1958] 2 All E.R. 675, C.A.

Transport. The Liverpool Corporation granted free travel concessions to old people and certain other "qualified persons" under the provisions of the Public Service Vehicles (Travel Concessions) Act, 1955. By section 1 (4) of the Act the council in whose area another local authority ran public service vehicles might contribute to any "costs incurred . . . in . . . granting . . . travel concessions" in that area. On the question of the basis on which such "cost incurred" was to be calculated, *held*, that it was obtained by dividing the total expenditure of the undertaking for the year by the total number of journeys made by fare-paying passengers and pass-holders, for by this process it was possible to calculate the share of the total cost of the undertaking attributable to each passenger journey whether made by a fare-paying passenger or a pass-holder: LITHERLAND U. D. C. *v.* LIVERPOOL CORPORATION [1958] 1 W.L.R. 913; [1958] 2 All E.R. 489, Harman J.

Validity of resolution. The appellant left his child at a bus stop in Westmorland and the child was subsequently found without money wandering near the Westmorland–Lancashire border, when he was taken by a friend to an hotel in Lancashire. The Lancashire County Council children's officer, having seen the child, communicated with the Westmorland children's officer, who two days later took the child from the hotel to a children's home in Westmorland. The appropriate committee of the Westmorland County Council subsequently passed a resolution pursuant to section 2 of the Children Act, 1948, that the rights of the appellant should vest in the county council. On a complaint by the county council against the appellant that the resolution of the council should not lapse by reason of an objection by the appellant, the appellant contended that the child was not, at the time of the resolution, in the care of the county council within section 1 of the Act of 1948; that evidence as to his past mode of life was inadmissible; and that the resolution of the committee was invalid because the chairman was an unsatisfied judgment creditor of the appellant. The justices ordered that the resolution should not lapse. *Held*, that the Lancashire County Council had assumed the care of the child for the two days as was its duty and the Westmorland County Council had assumed the care thereafter; that the justices were entitled to take into account the appellant's past life; that the committee, being an administrative body, could not make a final order and the fact that the chairman was a creditor of the appellant did not invalidate the resolution: BARKER *v.* WESTMORLAND COUNTY COUNCIL (1958) 56 L.G.R. 267, D.C.

Reform

The Local Government Act, 1958 (6 & 7 Eliz. 2, c. 55) received the Royal Assent on July 23, 1958. The Act provides for a new system of general grants from the Exchequer to county and county borough councils and for review and alteration by new machinery of local government areas and authorities and other matters. Part I is concerned with grants and rates.

General grants will for the year 1959–60 and subsequent years be paid to recipient authorities in place of specific grants now payable in respect of particular services; the aggregate of the general grants for each year and the factors determining the amount payable to each recipient authority will be presented in general grant orders made by the Minister of Housing and Local Government which will provide for two or more years at a time and will not have effect until approved by a resolution of the House of Commons (s. 1). In fixing the annual aggregate the Minister is required to take into account the latest information about the rate of expenditure on the services concerned (Sched. 1), any probable fluctuation in the demand for those services which is of a general nature and beyond local control, the need for developing them, and the extent to which, having regard to general economic conditions, it is reasonable to develop them; the Minister may in certain circumstances adjust grants (s. 2). The Minister may make regulations for prescribing standards for the administration of any services giving rise to relevant expenditure, and may reduce the general grant in the case of any recipient authority failing to obtain such standards (s. 3). Certain grants for particular purposes are discontinued and will not be payable for the year 1959–60 or any part of it (s. 4). Section 5 provides for rate deficiency grants (formerly Exchequer Equalisation Grants) calculated yearly, which are limited to normal expenditure (s. 6), except in special cases (s. 7). Section 8 provides for rate equalisation in London. Provision is made for the rating of industrial and freight-transport hereditaments (s. 9), the showrooms of Gas and Electricity Boards (s. 10), Gas Board hereditaments (s. 11), the Generating Board and Area Electricity Boards (s. 12) and Electricity Council premises (s. 13). Section 14 provides for the consequential amendment of valuation lists. Sections 15, 16 contain transitional and supplementary provisions.

Part II of the Act deals with reviews of local government areas.

Section 17 sets up one Local Government Commission for England and another for Wales each charged with the review of the organisation of local government and, in certain "special review areas" (specified in Sched. 3 to the Act), the distribution of functions. The general scope of a Commission's proposals is set out in section 18. Sections 19, 20 set out the scope of a Commission's proposals, including proposals as to the redistribution of functions, in special review areas. Sections 21, 22 deal with the procedure for a Commission's reviews and its report to the Minister. The Minister may give effect to a Commission's proposals (s. 23), and, in default of proposals, initiate changes himself (s. 24). A special review area may be varied at any time before a Commission has formulated its proposals in respect of it (s. 25).

Sections 26, 27 and Sched. 6 contain provisions as to joint boards and provide for the subsequent variations of such provisions. Sections 28–33 contain provisions as to the holding of reviews by county councils; such reviews are to be begun as soon as it is practicable and are intended to be repeated after the interval of a decade; section 28 does not apply to the administrative county of London at all or to Greater London unless applied by order in council. A population of 100,000 is presumed to be sufficient to support the discharge of the functions of a county borough council (s. 34). No local authority may promote a bill for forming a new or altering an old local government area for 15 years from the commencement of the Act (s. 35). The Minister may make regulations for a Commission (s. 36) and it may be dissolved by order in council (s. 37). Section 38 contains consequential and transitional provisions with regard to this Part of the Act. Section 39 contains financial provisions. Section 40 provides for parliamentary resolutions on orders made under this part of the Act. Section 41 provides for the revocation of orders. Section 42 contains supplementary provisions as to statutory water undertakings. Boundaries between English and Welsh areas cannot be affected (s. 43). Section 44 contains provisions as to the Cinque Ports. Section 45 saves the Royal Prerogative.

Part III of the Act provides for the delegation of functions to councils of county districts.

Section 46 provides for schemes (delegation schemes) for the exercise of health and welfare functions by councils of county districts on behalf of county councils. Section 47 lays down the procedure for bringing a delegation scheme into operation. Delegation schemes may be varied or revoked (s. 48). The Minister of Health has certain powers if councils default in exercising delegated powers (s. 49). Certain powers to submit proposals under the National Health Service Act, 1946, and the National Assistance Act, 1948, cannot be directly delegated (s. 50). Section 51 applies the foregoing provisions of Part III to joint boards. Section 52 provides for new claims to the status of excepted district under the Education Act, 1944, Sched. 1, Part III. Section 53 excludes the metropolitan area from Part III of the Act but provides for its application to any part of the area by virtue of an order in council.

Part IV is general and supplementary.

The power of trustees to lend to local authorities is extended (s. 54). Local authorities may establish and operate a Consolidated Loans Fund (s. 55). County councils may contribute to the expenses of county district councils (s. 56). Compulsory county contributions to local health salaries accruing after March 31, 1959, are abolished (s. 57). From April 1, 1959, local authorities are required to make proper arrangements for the receipt and issue of money, specific restrictions being removed (s. 58). Section 59 contains provisions for the change of the name of a county or borough. Section 60 provides for the transfer and compensation of officers under Parts II and III of the Act. Section 61 provides for payments out of moneys provided by Parliament. Section 62 and Sched. 8 contain minor consequential amendments. Section 63 contains general provisions as to inquiries under the Act. The Minister may make rules and regulations under the Act by statutory instrument (s. 64). Section 65 provides for the ascertainment of the population of an area. Section 66 is an interpretation section. Section 67 and Sched. 9 contain repeals. The Act may be cited as the Local Government Act, 1958 (s. 68).

The Act, apart from section 54 (trustee investments), does not extend to Northern Ireland, and none of the Act applies to Scotland. The rating provisions of the Act (ss. 9–14) take effect for rating periods beginning after March 31, 1959.

Sections 57 (contributions to local health salaries), 58 (financial officers) and those repeals contained in section 67 and Sched. 9 covered by provisos (*a*), (*b*), (*d*) to that section come into effect on April 1, 1959.

The repeals covered by proviso (*c*) to section 67 and contained in Sched. 9, Part III, come into effect on April 1, 1960. Apart from the above, the Act came into force on July 23, 1958. For circular on financial provisions, see Ministry of Housing and Local Government Circular No. 52/58.

The Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958 (6 & 7 Eliz. 2, c. 64) received the Royal Assent on August 1, 1958. The Act provides for a system of general grants to local authorities in Scotland in place of specific grants now payable in respect of particular services; the aggregate of the general grants for each year and the factors determining the amount payable to each recipient authority will be presented in general grant orders made by the Secretary of State for Scotland which will provide for not less than two or more than three years at a time and will not have effect until approved by a resolution of the House of Commons (s. 1). In fixing the annual aggregate the Minister is required to take into account the latest information about the rate of expenditure on the services concerned, any probable fluctuation in the demand for these services which is of a general nature and beyond local control, the need for developing them, and the extent to which, having regard to general economic conditions, it is reasonable to develop them; the Secretary of State may in certain circumstances adjust grants (s. 2). The Secretary of State may make regulations for prescribing standards for the administration of any services giving rise to relevant expenditure, and may reduce the general grant in the case of any recipient authority failing to obtain such standards (s. 3). Certain grants for particular purposes are discontinued and will not be payable for the year beginning May 16, 1959, or for any subsequent year (s. 4). The Education (Scotland) Fund is abolished (s. 5). Section 6 provides for certain consequential amendments in other enactments. Provision is made for rating of salmon fishings and other industrial and freight transport lands and heritages (s. 7), and for the sittings of valuation appeal committees (s. 8). Section 9 provides for the valuation for domestic water rates of lands and heritages of Gas Boards. Limits on expenditure by councils on halls, etc. for public meetings cease to have effect (s. 10). Restrictions on the power of local authorities to borrow money are made permanent (s. 11), and the maximum period for repayment of sums borrowed for certain purposes is extended (s. 12). Section 13 abolishes certain requirements relating to local government administration, and section 14 amends section 7 of the Education (Scotland) Act, 1946. Section 15 provides for the inspection of minutes of certain authorities. Section 16 provides for the extension of trustees' power to lend money to local authorities. The Secretary of State may make regulations for the increase of certain fees payable under enactments relating to marriage and to the registration of births, deaths and marriages (s. 17). Section 18 provides for transitional adjustments and section 19 for the defraying of expenses resulting from the Act. Section 20 provides that orders and regulations be made by statutory instrument. Section 21 is an interpretation section, and section 22 provides for repeals of enactments.

The Act applies to Scotland only.

Water

Deficiencies. The Water Act, 1958 (6 & 7 Eliz. 2, c. 67) received the Royal Assent on August 1, 1958. The Act provides for temporary powers to be given to statutory water undertakers to meet deficiencies in their supplies of water in time of drought. Section 1 enables powers to be conferred by order on statutory water undertakers to take water in the event of a serious water shortage caused by or threatened by drought, from additional sources for a period of six months, or to suspend or modify for such a period restrictions and obligations otherwise imposed on them in relation to the taking or treatment of water or the discharge of compensation water; such undertakers may also be authorised by such an order to execute necessary works and for this purpose to enter on and use land subject to payment of compensation. Section 2 enables powers to be conferred by order on statutory water undertakers to supply water during a drought by means of stand-pipes and water-tanks and to erect these in any street in their area. Regs. 50A, 56 of the Defence (General) Regulations, 1939, which are replaced by the foregoing provisions of the Act are revoked with savings for existing orders until March 31, 1960 (s. 3). Section 4 is an interpretation section. Section 5 provides for expenses.

The Act applies to Scotland but not, except for section 3, to Northern Ireland. The Act came into force on September 1, 1958.

Regrouping. The Ministry of Housing and Local Government has issued Circular No. 41/58, dated July 23, 1958, referring to Circular No. 52/56 issued on September 26, 1956 (see [1956] P.L. 277) which asked all water undertakers to consider their role in the process of regrouping. From the date of that Circular to June, 1958, the number of water undertakings in England and Wales was reduced by 33, the total number of undertakings at the end of June was 993. The new Circular points out that many preliminary discussions have been going on for a long while and ought to be brought to a head, and offers more precise suggestions on methods of achieving further progress towards regrouping.

See also COMPULSORY PURCHASE (above, p. 374); HOUSING (above, p. 380); PUBLIC HEALTH (below, p. 404); TOWN AND COUNTRY PLANNING (below, p. 406).

MONOPOLIES AND RESTRICTIVE PRACTICES

Resale price maintenance

G., a manufacturer of motor tyres, imposed a price restriction on the sale of tyres. The British Motor Trade Association sent a circular to L., who was a retailer of motor tyres. The circular, which was sent on the authority of G., stated the effect of section 25 of the Restrictive Trade Practices Act, 1956, and the fact that G.'s tyres were subject to a price restriction, but without specifying the prescribed price. L., who was not in direct contractual relationship with G., sold G.'s tyres for less than the prescribed price. G. applied for an interlocutory injunction. *Held*, that as L. had notice that the tyres were not to be sold at less than a price fixed by the manufacturers, albeit the exact price was not stated, he had received notice of the condition within section 25 (1).

The notice does not need to be an express notice of the conditions sought to be enforced: GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN) *v.* LANCASHIRE BATTERIES [1958] 1 W.L.R. 857; [1958] 3 All E.R. 7, C.A.

The defendants sold a tyre manufactured by the plaintiff company for £5 10s. The tyres manufactured in accordance with the plaintiff company's patents were sold subject to the express condition that they should not be sold to a retail customer for more or less than £6 6s. The question was whether an offer and sale at a price other than £6 6s. constituted an infringement of the plaintiff company's letters patent. Lloyd-Jacob J. *held*, (1) a purchaser from the plaintiff company bought subject to the retail price condition because such condition was a limitation upon the grant of the licence to deal in the patented article, and the defendants had, therefore, infringed the plaintiff company's patent; (2) on a claim under the Restrictive Trade Practices Act, 1956, s. 25 (1), since the date of acquisition of the tyre by the defendants was not established, his Lordship assumed that it was prior to November 2, 1956, the date on which the Act came into effect, and he held that the Act had no retrospective operation; therefore, the claim under the Act failed: DUNLOP RUBBER CO. *v.* LONGLIFE BATTERY DEPOT [1958] 1 W.L.R. 1033; [1958] 3 All E.R. 197.

NATIONAL HEALTH SERVICE

Debates

House of Lords. On July 2, 1958, the House debated the hospital services (210 H.L. Deb. 447–514).

House of Commons. On July 30, 1958, the House debated the National Health Service which came into existence on July 5, 1948. The debate was opened by Mr. Aneurin Bevan who, as Minister of Health in 1948, had launched the service. He said that 98 per cent. of the people of Great Britain were registered under the service with general practitioners, and emphasised the great advances that had been made in the prevention and treatment of disease. He then criticised the financial policy of the Government towards the service.

The Minister of Health, giving some figures to illustrate the progress achieved since 1949, said that effective hospital beds were up by 6½ per cent., in-patients admitted to hospital were up by 29½ per cent., the ratio of treatment to beds was up by 22 per cent., new out-patients treated were up by 12 per cent., and the waiting lists were down by 11½ per cent. On the domiciliary side, the number of home nurses had increased by 23 per cent. and visits paid by home nurses by 50 per cent.

On the therapeutic side, there had been a striking change in the pattern of disease, chiefly notable in the downward curve of some of the historic scourges such as maternal mortality, tuberculosis, diphtheria and syphilis. Tuberculosis mortality in England and Wales had declined from nearly 22,000 cases in 1948 to well under 5,000 in 1957, and most of the rapid progress had been made in the last few years. The slump in diphtheria dated from well before the inception of the National Health Service—from the immunisation campaign in the early 1940s; in 1940 there were 46,000 notifications and nearly 2,500 deaths in England and Wales. Last year, there were only 37 notifications and six deaths. On the other hand, there had been an upward curve in such diseases as cancer of the lung, leukaemia and arterio-scelerotic diseases. By increasing the expectation of life greater emphasis was put on the malignant and degenerative diseases of the later years of life. Two signposts for future action were provided by these successes: first, there was the importance of preventive medicine and action; secondly, there was the contribution which could be made to the hospital accommodation problem by the virtual elimination of some diseases. Surplus tuberculosis beds, for example, were being used for geriatrics, chronic sick and mental treatment. Promising preventive measures undertaken included vaccination against poliomyelitis and the fluoridation of water supplies in certain areas with the aim of demonstrating its efficacy in reducing dental decay.

With the prospect of a population in 1975 of which one person in seven would be aged over 65, as against one in 21 at the beginning of the century, the policy, the Minister said, was to seek to keep the elderly in their homes as long as possible and, when they had to go to hospital, to rehabilitate them whenever possible so that they could live at home again, helped by home nursing and other domiciliary services. Two encouraging developments in the treatment of in-patients and out-patients had been achieved: there had been a steady rise in attendances at the chronic sick and geriatric clinics (from just under 7,000 in 1950 to over 39,000 in 1957) and, although there had been only a small increase in the number of beds, a better use of them had enabled more in-patients to be treated. There were now over 70 geriatric departments to assess elderly patients and rehabilitate them by active treatment.

The speed and stress of modern life had increased the ratio of mental to physical illness. More than two out of five hospital beds today were devoted to those suffering from mental disorder. On the credit side, there was an increased awareness and public understanding of the importance and complexity of the problems, especially in recent years. The Royal Commission on Mental Health had recommended, among other things, the abandonment of the assumption of the need for compulsion in favour of care without deprivation of liberty for all who needed it and were not unwilling to receive it. As a result of the consequent review now in progress, 12,000 recommendations for discharge from compulsory powers had so far been accepted by the Board of Control. In the sphere of treatment, encouraging progress was being made, particularly in the increased range of out-patient psychiatric services now provided, more than three-quarters of them at general hospitals. Between 1953 and 1957 out-patient attendances rose by well over a third. There were now 25 day hospitals and four more would be opened shortly. As in other illnesses, the aim was to retain more people in the community during treatment and to return them to the community after treatment.

In the first ten years of the National Health Service, £100 million was spent on hospital buildings and the running costs of hospitals were taking up nearly 54 per cent. of total expenditure on the service. The Minister announced that the present experimental organisation and methods unit at the Ministry of Health would be enlarged and made permanent, and that a group of management consultants had offered to undertake a series of surveys at their own expense to demonstrate the economies and improvements in efficiency which could be achieved in the hospital service by work study. The Minister had accepted this offer and, in consultation with the authorities concerned, had suggested the following four subjects for study: (1) a work study of the portering services at a provincial teaching group of hospitals; (2) a study of general maintenance work at a London group hospital management committee; (3) a survey of the work of the hospital laundry at a mental hospital; and (4) an inquiry into the possibility of making better use of nursing and other ward staff at a London teaching hospital. The Minister was able to report an increase in the nursing staff between the end of 1949 and March, 1958, of 20 per cent. for whole-time staff and 75 per cent. for part-time staff. It was now possible to look for an early reduction in the standard working hours from 98 to 88 a fortnight.

The Parliamentary Secretary to the Ministry of Health referred to the key position of the general practitioner, and said that every effort was being made to improve his liaison with hospitals and local health authority services. There had been a notable increase in partnership in general practice. The percentage of practitioners in partnerships had increased from 50 per cent. in 1948 to about 68 per cent. Group practices had been encouraged with the aid of interest-free loans; these had generally proved more popular with the medical profession than health centres.

A number of expert inquiries on the problems of the National Health Service are in progress. These include the Royal Commission on Doctors' and Dentists' Remuneration (a problem involving the status of the general practitioner and the restoration of his former relationship to the consultant and the hospital service), the Hinchliffe committee on the costs of prescribing, the Younghusband working party on the recruitment, training and field of work of social workers, and the Cranbrook committee on the organisation and content of the maternity services.

Another aspect of the service referred to in the debate was the part played in it by voluntary service, especially in hospitals, both in administration and in a variety of practical tasks undertaken for the welfare of patients. In looking back over ten years of the National Health Service, the Minister singled out for comment the fact that the strength of the voluntary spirit had continued unabated. The Parliamentary Secretary said that the Health Service, of all Britain's public services, relied most on voluntary help in administration—by members of councils, committees and boards. " We are deeply grateful to them for their help," he said, " . . . they keep alive the voluntary spirit which must always permeate a service so human and personal as the National Health Service " (592 H.C. Deb. 1390–1515; see also Commonwealth Survey, C.O.I., August 19, 1958).

Health Services Council

Report of a Committee (Chairman: J. Dunlop) on Mental Health Legislation of the Scottish Council has been published (H.M.S.O. 49–431).

Remuneration

Royal Commission. The Minutes of Evidence have been published of the 14th and 15th Days (H.M. Treasury, Ministry of Health, Department of Health for Scotland, Central Statistical Office); 16th and 17th Days (Royal College of Surgeons of England, Royal College of Obstetricians and Gynaecologists); 18th Day (Society of Medical Officers of Health, Society of Medical Officers of Health (Scottish Branch), Association of County Medical Officers of Health of England and Wales); 19th Day (Medical Research Council, Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom); and 20th Day (Scottish Association of Medical Administrators, Medical Superintendents' Society).

Statutory amendment

The Medical Act, 1956 (Amendment) Act, 1958 (6 & 7 Eliz. 2, c. 58) received the Royal Assent on August 1, 1958. It amends the provisions of the Act of 1956 relating to the experience required for full registration and to applications for provisional registration, and to fees, expenses and allowances under Sched. 1 to the Act of 1956.

The Opticians Act, 1958 (6 & 7 Eliz. 2, c. 32) received the Royal Assent on July 7, 1958. The Act provides a recognised status for ophthalmic opticians and dipensing opticians, regulates the professional conduct and practice of opticians, sets up a General Optical Council and imposes restrictions on the testing of sight and the supply of optical appliances.

Section 1 establishes a General Optical Council with the object of promoting high standards of professional education and conduct. Section 2 provides for the establishment of a register of dispensing opticians and of two registers for ophthalmic opticians, one for those testing sight and fitting and supplying optical appliances and the other for those testing sight only. Section 3 sets out the qualifications for being registered and provides that after a day to be appointed only persons having qualifications approved by the Council under section 5 shall be entitled to be registered. Section 4 establishes a list of bodies corporate carrying on business as ophthalmic opticians and a list of such bodies carrying on business as dispensing opticians and lays down the qualifications for enrolment on those lists. Section 5 gives power to the General Optical Council to approve certain training institutions and qualifications and gives a right of appeal to the Privy Council in cases where a training institution has been refused approval by the General Optical Council. Section 6 imposes on the General Optical Council the duty of supervising training institutions and qualifying examinations and gives it power to appoint visitors and, subject to appeal to the Privy Council, to withdraw approval from unsatisfactory institutions. Sections 7 and 8 contain supplementary provisions as to the keeping and publication of the lists and registers. Sections 9–16 contain provisions as to disciplinary proceedings and give an appeal to the Judicial Committee of the Privy Council in cases where the punishment named is erasure from a list or register. Sections 17, 18 provide for the setting up of Education and Companies Committees of the Council and section 19 gives a general power to appoint committees. Section 20 places restrictions on the testing of sight. Section 21 restricts the sale and supply of optical appliances. Section 22 contains penalties. Section 23 makes provision in case of the death or bankruptcy of a registered optician. Section 24 provides penalties for bodies corporate.

Section 25 contains miscellaneous matters with respect to which rules may be made. Section 26 provides for the appointment of a registrar of the

Council. Section 27 deals with the expenses and accounts of the Council. Section 28 gives power to the Privy Council to issue directions to the General Optical Council if it appears that it has failed but ought to discharge any function. Section 29 contains supplementary provisions as to the exercise of the powers of the Privy Council under the Act. Section 30 is an interpretation section.

Section 31 (2) declares that the Act extends to Northern Ireland and that for the purposes of the Government of Ireland Act, 1920, s. 6 (which precludes the Parliament of Northern Ireland from amending Acts of the Parliament of the United Kingdom passed after the day appointed for that section to come into operation), the Act shall be treated as passed before that day.

By section 31 (3) the Act will come into operation as a whole or in part on a day or days to be appointed by Order in Council.

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS, **Ministers' Functions and Research** (above, pp. 379, 380); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 407).

NATIONAL INSURANCE

Decisions of the Commissioner and the Tribunal

Availability for employment. Claimant declared that she would take employment on only three days a week. *Held*, that she was entitled to benefit for the three days on which she used to work but was not available for employment on the other days. Reg. 6 (1) (*aa*) of the Unemployment and Sickness Benefit Regulations was not relevant because she had not imposed restrictions regarding employment she was prepared to accept on those days but was refusing the possibility of employment altogether: Decision No. R(U) 15/58.

Day of unemployment. A steelworker whose normal working week had previously been one of six days, had been on short-time, working on only four days a week for more than a year. By agreement he was guaranteed employment and was under obligation to his employer for four days a week. In the week in question he did no work and received 4 days' pay. *Held*, that at the date in question he was a person who did not ordinarily work on every day in a week and that in the week in which that day occurred he had been employed to the full extent normal in his case. The remaining days in the week were not days of unemployment: Decision No. R(U) 16/58.

Under a guarantee agreement a five-shift worker was guaranteed employment for four shifts in any pay week. In a week in which a holiday occurred the guarantee period was reduced in the same ratio as the normal working hours were reduced. In the week in which Good Friday was a recognised holiday, he had no work on Thursday and claimed benefit. The claimant's employment was also subject to a Wages Regulation Order which was not in the same terms as the guarantee agreement. *Held*, that the normal working week was reduced by the holiday from five days to four days, *i.e.*, by ⅕th. The guarantee, being reduced in the same ratio, was reduced to 3⅕th days. The ⅕th fell on Thursday and the claimant was not, therefore, unemployed on that day. As the guarantee agreement was the more favourable to the claimant the Wages Regulation Order did not supersede it: Decision No. R(U) 17/58.

Ex gratia payments. An apprentice deck officer completed his apprenticeship and took up a full-time training course for a second mate's certificate. His former employer paid him £14 a month during the course and for some weeks after he had finished it. The training course was not one approved by the Minister. *Held*, that he was entitled to benefit after the course ended. The payment by his employer was gratuitous: Decision No. R(U) 13/58.

Interruption of employment. Claimant's last day of unemployment before returning to work was a Saturday. He again became unemployed and claimed benefit on a Monday. The intervening period was 13 weeks and one day if Sundays were included. *Held*, that Sundays were to be included when calculaing the interval between spells of interruption of employment: Decision No. R(U) 12/58.

"Normal course." A tanyard employee was working short time and claimed benefit for a Saturday. His employment was governed by an agreement which provided that the normal working week was one of five days (Monday to Friday inclusive). The agreement also required the claimant to work on Saturdays if needed. In the 52 weeks before the claim he had worked on 39 Saturdays. *Held*, that the Saturday was not a day on which in the normal course the claimant would not work in an employed contributor's employment. What was normal for the claimant could be determined not from the agreement but from his record of employment over a period of time, just as in judging whether in a certain week a person was employed to the full extent normal in his case: Decision No. R(U) 19/58.

Prescribed accommodation. Before entering hospital, the claimant was living in a hostel provided by a local authority under section 28 (1) of the National Health Service Act, 1946, for homeless ambulant infective tuberculosis men. There was a visiting medical officer but no other medical or nursing services were provided in the hostel. The claimant was permitted to reside there as long as he wished and part of the cost was borne by the local authority. *Held*, that the hostel was prescribed accommodation for the purposes of the Hospital In-Patients Regulations and that the claimant had been permitted to reside there otherwise than temporarily. The regulations do not require that the authority should give a formal decision regarding residence in the accommodation. On entering hospital his benefit fell to be reduced: Decision No. R(S) 6/58.

Residence. A man left his home to seek work in another part of the country, intending to return to local employment when possible. He claimed an increase of unemployment benefit in respect of his five illegitimate children, who were living at home with their mother with whom he normally resided. *Held*, that the woman was "for the time being residing with him." These words in section 23 (2) of the National Insurance Act, 1946, are to be interpreted in the light of section 78 (3) regarding the temporary absence of one of two persons residing together: Decision No. R(U) 14/58.

Retirement. Claimant worked as an assistant librarian in a small public library for 5 hours a day on Tuesdays and Fridays; and as a book-keeper for a local shopkeeper for 2 hours a day on Mondays, Wednesdays and Fridays. Her duties, which were light, were thus performed on four days and amounted to 16 hours a week. *Held*, that she was engaged in a gainful occupation in circumstances not inconsistent with retirement: Decision No. R(P) 3/58.

Share fisherman. A share fisherman did not fish because fishing had become uneconomic in the area he normally fished at that time of the year. Other vessels had left the area to fish elsewhere. *Held*, that it had not been proved that there was an absence of fish from any waters in which the vessel could reasonably be expected to operate. "Absence of fish" means absence of other than a negligible quantity of fish. Absence not proved on any day if landings took place on the day preceding or the day following: Decision No. R(U) 20/58.

Sickness benefit. A woman whose husband was away in the forces claimed an increase of benefit in respect of her mother who lived with her. The household also included her child and her brother. She received a marriage allowance and an allotment of pay from the Air Ministry and earnings from her work. *Held*, that the marriage allowance and the allotment, if treated as her contribution to the general household fund, were to be allocated to her or to her and the child only; this enabled her to show that she was mainly maintaining her mother: Decision No. R(S) 7/58.

Trade dispute. A shearer in a steel rolling mill employed on piece rates lost employment when scalers employed on time rates went on unofficial strike for revised bonus earnings. Both grades were included in teams and their bonuses were calculated in accordance with an industrial agreement on their team's output. The scalers wanted a separate bonus not dependent on the team's effective output. *Held,* that neither the claimant nor any member of his grade was directly interested in the dispute as shearers did not stand to gain or lose from its outcome, and therefore was not disqualified from receiving unemployment benefit. An interest in the mere formal maintenance of an industrial agreement divorced from any probability of material change does not constitute direct interest: Decision No. R(U) 18/58.

Widow's pension. A woman over the age of 50 at the date of her second husband's death would have been entitled to widow's pension after receiving widow's allowance if she had been married to him for 3 years. Her marriage to him had lasted less than 3 years. The local tribunal awarded widow's pension on the ground that the period during which she had been in receipt of widow's allowance could be added to the duration of the marriage for the purpose of establishing title to widow's pension. *Held*, that the local tribunal were in error. The effect of section 2 (2) of the National Insurance Act, 1956, discussed: Decision No. R(G) 1/58.

Proceedings

H. was charged with certain offences under the National Insurance Act, 1946. By section 53 (1) of that Act, proceedings are not to be instituted except by, or with the consent of, the Minister of Pensions and National Insurance or one of his officers. At H.'s trial the prosecution failed to prove, as part of their case, that the proceedings had been properly instituted. H. submitted that there was no case to answer; and that it was then too late for the prosecution to prove that the proceedings had been properly instituted. The justices upheld the submission. *Held,* that it was the duty of the clerk to the justices to ensure that the proceedings had been properly instituted at the time when the application was made for the summons; but unless the defendant made an objection that proceedings had been improperly instituted before the close of the case for the prosecution, the court should act on the presumption that the proceedings had been properly instituted; accordingly the justices were wrong in not allowing the prosecution to produce the consent of the Minister: PRICE *v.* HUMPHRIES [1958] 3 W.L.R. 304; [1958] 2 All E.R. 725, D.C.

Regulations

The following statutory instruments were approved by the National Insurance Advisory Committee, the reports of which are referred to in brackets: S.I. 1958 No. 1084 Residence and Persons Abroad (H.C. 230 of 1957–58); S.I. 1958 Nos. 1237 and 1238 Mariners and Airmen (H.C. 257 of 1957–58); S.I. 1958 No. 1239 New Entrants Transitional (H.C. 258 of 1957–58).

Regulations have been issued extending the right to pay contributions as a non-employed person in respect of an employed contributor's employment abroad and to have such contributions treated as contributions as an employed person. They provide that the provisions of the 1948 regulations which postpone payment of a person's benefit, including arrears of benefit due to him before he goes abroad, until he returns to Great Britain shall cease to have effect. They also provide that in certain cases an increase of benefit may be paid in respect of a spouse who is abroad (S.I. 1958 No. 1084).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS, **Ministers' Functions** (above, p. 379).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Benefits

Regulations have been made to amend the National Insurance (Industrial Injuries) Regulations, 1948, by providing that the provisions of those regulations which suspend the payment of benefit while the beneficiary is absent from Great Britain shall cease to have effect, and by allowing in certain cases an increase of benefit in respect of a spouse who is abroad. As a consequence they also provide that the special rules in the National Insurance (Industrial Injuries) (Airmen) Regulations, 1948, and the National Insurance (Industrial Injuries) (Mariners) Regulations, 1948, in relation to airmen and mariners as to disqualification for receiving death benefit and an increase of benefit in respect of a spouse and as to suspension of payment of benefit during periods of absence from Great Britain shall cease to have effect (S.I. 1958 No. 1083).

Decisions of the Commissioner and the Tribunal

Accident. A laundry worker who had handled blankets which were suspected to have been in contact with a smallpox patient was vaccinated on medical advice. She became incapable of work because of "vaccination reaction" and claimed injury benefit. *Held*, that injury benefit was not payable. Vaccination, the immediate cause of incapacity, was not an injury by accident and did not arise in the course of employment: Decision No. R(I) 12/58.

A foreman dock labourer was struck on the head by part of a mobile crane. Three weeks later he was admitted to hospital with a discharging ear and meningitis. He underwent an operation for removal of an abscess from the brain. After his death, nine days later, a post-mortem revealed a second abscess. *Held*, that death was not the result of injury by accident. A blow on the head cannot cause infection unless a fracture of the skull opens up a channel from the exterior: Decision No. R(I) 15/58.

A coal miner suffered minor injuries when part of the pit roof collapsed. His safety helmet was knocked off by the fall. Two days later he became unconscious and was found to have a haematoma on the right side of his head. He was removed to hospital where he died, five weeks later, of the effects of a cerebral thrombosis. *Held*, on the medical evidence that death did not result from injury due to industrial accident. Cerebral thrombosis is not due to trauma unless the injury is severe enough to cause damage to the brain: Decision No. R(I) 9/58.

Compensation supplement. A civilian employee of the R.A.S.C. received workmen's compensation, on the basis of total incapacity, for injuries received in 1903, 1907 and 1928. He continued with his employers until 1946 when he retired prematurely at the age of 60. He claimed an allowance under the Workmen's Compensation and Benefit (Supplementation) Act, 1956, and a payment was awarded to him from 29.8.56 to 27.8.57. *Held*, that compensation supplement was not payable from August 28, 1957. He had failed to prove that, after working for 18 years since his last accident, his inability to continue at work was due to the effects of the injuries which he had sustained: Decision No. R(I) 6/58.

A coal miner, who suffered injuries to his leg in 1947, was awarded maximum compensation, his partial incapacity having been treated as total because it severely restricted the type of work he was able to perform. Medical reports which took into consideration disabilities unconnected with the accident expressed the opinion that he was incapable of work and more or less unemployable. He claimed compensation supplement. *Held*, that compensation supplement was not payable. The Commissioner rejects the view that treatment of incapacity as "total" for the purposes of the Workmen's Compensation Acts necessarily means that the person concerned is incapable of work and likely to remain so for a considerable period for the purposes of the 1956 Act: Decision No. R(I) 17/58.

"*Out of and in the course of employment.*" During a storm an omnibus driver was temporarily blinded when the windscreen was struck by lightning. *Held*, that the injury was not the result of accident arising out of the claimant's employment. He ran no greater risk of being injured than other persons in the area (Decision R(I) 12/56 compared): Decision No. R(I) 11/58.

Claimant, a slater and tiler, was injured while cycling from his home to a new site, to which he had been specifically directed. At the time of the accident he was carrying his tools and was in receipt of payment for travelling time. *Held*, that the injury was not caused by accident arising out of and in the course of employment: Decision No. R(I) 16/58.

A bus conductor was attacked by two youths who had jumped on the platform of the bus, not with the intention of being passengers, but with malicious intent to injure anyone whom they might encounter. *Held*, that the injuries were not the result of accident arising out of and in the course of the claimant's employment. He was not by reason of his employment exposed to risk of assault by persons who were not passengers: Decision No. R(I) 21/58 (see below, p. 404).

Review. Claimant was awarded and paid a disablement gratuity of £33 15s. based on a final assessment of 2 per cent. for life. Following payment of this sum he appealed. On appeal the assessment was revised to 5 per cent. for three months, giving title to a gratuity of £2 9s. *Held*, that the claimant was not required to repay the sum of £31 6s. overpaid. He accepted the amount in good faith having been told that its acceptance did not affect his right of appeal. He had not, at any time, been advised that, on appeal the gratuity might be reduced: Decision No. R(I) 14/58.

The claimant following an award of disablement benefit of 15 per cent. for life, was paid a gratuity of £180. He appealed against his assessment, which was increased by the medical appeal tribunal to 20 per cent. for life, and was awarded a disablement pension of 13s. 6d. a week in lieu of the gratuity. The insurance officer authorised payment of the pension at the rate of 6s. 9d. per week until the balance of the gratuity had been liquidated. The local appeal tribunal offset 5s. per week against the balance of gratuity, leaving 8s. 6d. payable as pension. *Held*, that pension was not payable at a rate exceeding 6s. 9d. Proviso (ii) of Regulation 28 (2) of the Industrial Injuries Determination of Claims and Questions Regulations does not permit payments already made to be treated as made at a rate of less than one-half of the weekly rate: Decision No. R(I) 19/58.

Special hardship allowance. A small arms examiner became incapable of work by reason of dermatitis. When he resumed work he examined dry articles only. Three and a half years later this type of work was no longer available and he was transferred to other duties at a lower wage. He claimed an increase of disablement benefit. *Held*, that special hardship allowance was payable. The claimant's ability to perform specially selected work was not proof that he was capable of following employment of an equivalent standard to that of his regular occupation: Decision No. R(I) 7/58.

Claimant, a machineman, left his regular occupation in 1953 because of an industrial accident he suffered on November 14, 1953. He was found to have pneumoconiosis in 1956, and there was a reasonable probability that he was suffering from the disease in November, 1953. *Held*, that special hardship allowance was not payable under regulation 16A of the Prescribed Diseases Regulations. He did not abandon his regular occupation as a result of pneumoconiosis: Decision No. R(I) 8/58.

Claimant worked as a brusher until 1950 when for health reasons he left the coal-mining industry and became a roadman with the local authority. In April, 1955, he was examined by a pneumoconiosis medical board who diagnosed pneumoconiosis and fixed the date of development as September, 1954. Disablement benefit was awarded from that date to April, 1958. He claimed special hardship allowance in November, 1957, on the ground that his abandoned occupation of brusher should be treated as his regular occupation under regulation 16A of the Prescribed Diseases Regulations. *Held*, that special hardship allowance was payable from June 12, 1957. The claimant could be treated as having abandoned brushing because of pneumoconiosis: Decision No. R(I) 13/58.

Wife gainfully employed. Claimant in receipt of injury benefit claimed and was paid increase for a dependent wife. Some months later she commenced employment as a shop assistant for four days a week from which she earned more than the prescribed limit. *Held*, no increase payable as even though his wife was not employed every day of the week she was engaged in a gainful occupation and the employer-employee relationship was unbroken (R(S) 27/54 distinguished): Decision No. R(I) 10/58.

Prescribed diseases

Regulations have been made introducing a new Schedule of prescribed diseases in place of Part I of the First Schedule to the Prescribed Diseases Regulations, 1948, made under the National Insurance (Industrial Injuries) Act, 1946. The new Schedule includes all the diseases which have been added to the original Schedule since it was introduced in 1948, and also makes certain amendments which were recommended by the Industrial Injuries Advisory Council in their report (Cmnd. 416). The principal alterations are in the description of various forms of industrial dermatitis and of diseases due to radiation, and in the occupations in respect of which tuberculosis is prescribed. Diseases are numbered in the new Schedule to correspond as closely as possible with the numbers they bore in the old Schedule, gaps being left in the numbering in the new Schedule where the descriptions of diseases have been amalgamated or substantially altered.

There are transitional provisions which preserve rights acquired under the old Schedule and secure that certain cases shall continue to be treated under the old Schedule where this is more advantageous to the claimant. Where the new Schedule is more advantageous it will be applied, with certain qualifications, from the date of the instrument, to cases where the disease was contracted or the death occurred before that date, under the retrospective power contained in section 55 of the Act (S.I. 1958 No. 1068).

NATIONALISED INDUSTRIES

General

Finance. The Chancellor of the Exchequer, after his statement on the relaxation of control of borrowing on July 3, 1958, said, in answer to a question, that he was keeping the matter of the restrictions on investment programmes of the nationalised industries, announced in September, 1957, under continuous consideration (590 H.C. Deb. 1600–1601, July 3, 1958; see also 591 H.C. Deb. 993–994, July 15, 1958).

Section 42 (3) of the Finance Act, 1956, as amended by the Nationalised Industries Loans Act, 1958, limited to £700m. the total of advances to nationalised industries and prohibited advances after the end of August, 1958. Section 36 of the Finance Act, 1958 (6 & 7 Eliz. 2, c. 56) substitutes £1,070m. for £700m. and 1959 for 1958.

Parliamentary examination. On July 14, 1958, the House of Commons debated the Report from the Select Committee on Nationalised Industries (Reports and Accounts) and of the Annual Report and Statement of Accounts of the National Coal Board for 1957 (591 H.C. Deb. 829–950).

The Select Committee on Nationalised Industries (Reports and Accounts) issued a Special Report together with the proceedings of the Committee. The Report stated that the Committee had begun an inquiry into the British European Airways Corporation and the British Overseas Airways Corporation which they would not be able to complete in the 1957–58 session and recommended the appointment of the Committee in the next session to continue the work (H.C. 304 of 1957–58).

Airways

Advisory council. The report of the Air Transport Advisory Council for 1957 has been published together with a statement by the Minister of Transport and Civil Aviation (H.C. 241 of 1957–58).

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 266 of 1957–58) and the British Overseas Airways Corporation (H.C. 267 of 1957–58).

Parliamentary examination. See **General** (above, p. 396).

Reports. The report and accounts of the British Overseas Airways Corporation for 1957–58 have been published (H.C. 239 of 1957–58).

The report and accounts of the British European Airways Corporation for 1957–58 have been published (H.C. 240 of 1957–58).

Atomic Energy

Report. The report of the United Kingdom Atomic Energy Authority for 1957–58 has been published (H.C. 242 of 1957–58).

Coal

Consumers' Councils. The reports of the industrial and domestic consumers' councils for 1957–58 have been published (H.C. 247 of 1957–58).

Parliamentary examination. See **General** (above, p. 396).

Price control. The Coal (Revocation) Order, 1958, has been made repealing numerous price control orders (S.I. 1958 No. 1108).

Electricity

Constructional schemes. On July 14, 1958, the House of Commons debated a motion for the annulment of North of Scotland Hydro-Electric Board (Constructional Scheme No. 30) Confirmation Order, 1958 (S.I. 1958 No. 885). The motion was defeated (591 H.C. Deb. 951–982).

The North of Scotland Hydro-Electric Board (Constructional Scheme No. 47) Confirmation Order, 1958 (S.I. 1958 No. 1216) was made on July 23, 1958. An explanatory memorandum has been published (Cmnd. 494).

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the Electricity Council (H.C. 269 of 1957–58), the North of Scotland Hydro-Electric Board (H.C. 271 of 1957–58), and the South of Scotland Electricity Board (H.C. 272 of 1957–58).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 270 of 1957–58).

Transport

Confirmation Act. The British Transport Commission Order Confirmation Act (6 & 7 Eliz. 2, c. xxviii) received the Royal Assent on July 23, 1958. The Act empowers the Commission to make certain works, to acquire land for this purpose and confers other powers.

Debate. On July 17, 1958, the House of Commons debated the report of the British Transport Commission for 1957 (591 H.C. Deb. 1457–1515).

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 273 of 1957–58).

Inland waterways. In February, 1956, the Minister of Transport and Civil Aviation appointed a committee of inquiry into inland waterways, under the chairmanship of Mr. H. Leslie Bowes, to consider and make recommendations concerning the future of the system of inland waterways in Great Britain, and the law relating to the closing of waterways to navigation. The report of the committee was published on July 28 (Cmnd. 486).

After a historical survey of the development and extent of the waterways, the report considers existing nationalised waterways in Great Britain, and makes recommendations for their development and use, dealing separately with England and Wales and Scotland. It then deals with other waterways, and finally with the existing law and the need for revision.

The British Transport Commission controls some 2,170 miles of waterways, of which about 1,420 are used by commercial traffic. The physical condition of the canals varies greatly, and many are unsuited to modern traffic, though even disused canals have a social value for amenity and recreation. The canals had been neglected before the Commission took them over, and arrears of maintenance have added substantially to costs. Deficit on operating account was £485,000 in 1950, and the committee estimates that the total cost of the waterways to the Commission (including compensation on vesting and the accumulated deficit) is about £25 million. The book value of the waterways with their associated land, buildings, craft, vehicles, plant and equipment was estimated as £24·8 million at the end of 1956. In January, 1956, the Commission started a £5½ million development plan for the improvement of selected waterways.

The committee recommends that about 1,300 miles of waterways in England, now vested in the British Transport Commission, should be made an integrated and efficient system of inland navigation. Of these, 380 miles, which, taken together, currently earn a surplus, should be treated as class A waterways. Most of them are being improved under the Commission's programme and these improvements should, in the committee's opinion, go forward. The remaining (or class B) waterways, mainly narrow canals, should be restored over five years to a width and depth which would enable the largest craft built for use upon them to navigate safely with full payloads. Existing doubt and insecurity among canal users should be removed by a commitment to maintain the navigable system to prescribed standards for 25 years. The existing system of tolls, based on tonnage of goods carried, should be abolished, and annual licence fees of, say £1 per ton of capacity substituted; the licensing system should extend to vessels carrying up to 60 tons, and a licensed vessel should be entitled to ply on any class B waterways without further charge. Non-transport uses of canals should be developed. The committee finds that water abstraction is extremely important, and recommends the development of non-potable supplies from canals. The reception of effluents and surface water should also be put on a contractual basis, though little revenue is earned from it. The right to authorise fishing should rest with the Commission, and a system of registration and licensing of pleasure craft should be introduced. The committee thinks that, if its proposals are accepted, class B waterways will incur deficits of about £½ million annually, in addition to capital expenditure conservatively estimated at £3½ million. It considers, however, that any other measures to deal with these canals will cost at least as much, and will be less advantageous to the community; and that funds will have to be found to meet these expenses, either by direct payments from the Exchequer or by some other means.

The Caledonian and Crinan canals, though unlikely to become viable commercial undertakings, should be kept in being for navigation, as they play an important part in the social and economic life of western and north-western

Scotland, and may in time become more important for transport. The Crinan canal should be improved. The Forth and Clyde canals should be closed to navigation but kept in being for the purpose of water supplies, like the Monkland canal and the Edinburgh and Glasgow Union canal. The working deficit of the two Highland canals and the cost of improving the Crinan canal should be borne by the State.

The chairman and three other members of the committee recommend that the nationalised waterways should continue to be administered by the British Transport Commission, but that substantial powers should be delegated to a statutorily-constituted body, consisting of three members of the commission and four other members nominated by the Minister. The four other members of the committee recommend, instead, that the nationalised waterways should be transferred to a new independent inland waterways corporation, to be set up by statute.

The committee does not recommend immediate nationalisation of any inland waterway which is now independently owned and managed. Owners of such waterways should, it suggests, be given powers in respect of water abstraction and reception of effluents and surface water, similar to those proposed for nationalised waterways. The dredging and reinstatement of the Norfolk and Suffolk broads, now being carried out by the Great Yarmouth Port and Haven Commissioners, should go forward, and the Commissioners should be given wider powers and greater revenues. The committee propose establishing new machinery for reviewing the value, to the community, of waterways which it has not recommended for inclusion in the navigable system, and for preparing schemes for their future use.

The committee considers that the mass of special Acts, some going back to the eighteenth century, under which the nationalised canals are now administered, should be swept away and replaced by a modern code of rights and duties, fashioned to meet present-day conditions.

(The above summary is based on Commonwealth Survey, C.O.I., August 19, 1958.)

PARLIAMENT

Constitution

House of Lords. The first list of creations under the Life Peerages Act, 1958, was published in a supplement to *The London Gazette* on July 24, 1958. The list contains the names of four baronesses for life and ten barons for life, and the new peers took their seats in the House of Lords at the beginning of the parliamentary session. The four life baronesses—the first women to be members of the House of Lords—are the Dowager Marchioness of Reading, chairman of the Women's Voluntary Services for Civil Defence, Baroness Ravensdale (a baroness in her own right), vice-chairman of the National Association of Girls' Clubs and Mixed Clubs, Dame Katherine Elliott, lately chairman of the National Union of Conservative and Unionist Associations, and Mrs. Barbara Wootton, formerly Professor of Social Studies in the University of London. The life barons include four present Members of Parliament (Sir Robert Boothby and Sir Ian Fraser, Conservative, and Mr. V. J. Collins and Mr. D. G. West, Labour), two former Labour Members of Parliament (Mr. E. A. A. Shackleton and Dr. S. J. L. Taylor), Sir Charles Geddes, a member of the General Council of the Trades Union Congress, Mr. V. F. Noel-Paton, a member of committees of the General Assembly of the Church of Scotland, Sir John Stopford, lately Vice-Chancellor of the University of Manchester, and Sir Edward Twining, Governor of Tanganyika 1949–58. Mrs. Wootton, Mr. Collins, Mr. West, Mr. Shackleton, Dr. Taylor and Sir Charles Geddes were recommended for life peerages by the Prime Minister after consultation with the Leader of the Opposition. (Commonwealth Survey, C.O.I., August 5, 1958).

An Order in Council has been made prescribing the Forms to be used for

Letters Patent creating Life Barons and Life Baronesses under the Life Peerage Act, 1958, and for the appointment of Lords of Appeal in Ordinary under the Appellate Jurisdiction Acts, 1876 and 1887. The Order amends the Crown Office Rules (No. 1) Order, 1927, which prescribed the Forms to be used for Letters Patent creating Dukes, Marquesses, Earls, Viscounts, Barons and Baronets (S.I. 1958 No. 1250).

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates issued its Third Report (on the Reserve Fleet) (H.C. 237 of 1957–58), its Fourth Report (on Lands Branches of the Service Departments) (H.C. 238 of 1957–58), its Fifth Report (on the Department of Scientific and Industrial Research) (H.C. 245 of 1957–58) and its Sixth Report (on Treasury Control of Expenditure) (H.C. 254 of 1957–58).

The Committee also issued its Fifth Special Report, containing the observations of the Treasury, the Board of Admiralty, the Secretary of State for Air and the Minister of Transport and Civil Aviation on the Fifth Report of the Committee in 1956–57 on the Meteorological Services and the Royal Greenwich Observatory (H.C. 263 of 1957–58); and its Sixth Special Report, containing the observations of the Secretary of State for the Home Department on the First Report of the Committee, on Police, England and Wales (H.C. 264 of 1957–58).

Nationalised Industries

See above, p. 396.

Offices (House of Lords)

Report. The Third Report from the Select Committee on the House of Lords offices has been published. It concerns travelling expenses of peers, arrangements for life peeresses, and other matters (H.L. (132) of 1957–58; see also 210 H.L. Deb. 686–688, July 8, 1958).

Privilege

In a debate in the House of Commons on July 8, 1958, Members discussed the question of whether a letter from a Member to a Minister about the administration of a nationalised industry was a "proceeding in Parliament," and was thus covered by Article 9 of the Bill of Rights, 1689, which states that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament." The House decided, by a small majority on a free vote, that a Member's letter to a Minister was not a proceeding in Parliament.

In his speech opening the Commons debate, Mr. Butler, Home Secretary, Lord Privy Seal and Leader of the House of Commons, recalled the developments in the particular case under discussion. In February, 1957, Mr. George Strauss, a Labour Member of Parliament and former Minister of Supply, wrote to the Paymaster-General (who answers in the House of Commons on matters concerning the Minister of Power, Lord Mills) about the disposal of scrap by the London Electricity Board (a nationalised body). The Paymaster-General had replied that the disposal of scrap was a matter of day-to-day administration and was therefore the responsibility of the Board, not of the Minister of Power. A copy of Mr. Strauss's letter was sent to the chairman of the Board, who considered that statements it contained were unjustified and asked for their withdrawal. This request being refused, the Board's solicitors wrote intimating that, if Mr. Strauss was not prepared to withdraw and apologise, proceedings for libel would be instituted.

On April 5, 1957, Mr. Butler continued, the matter was brought before the House of Commons, which referred it to the Committee of Privileges. The committee concluded that Mr. Strauss's letter to the Minister was a proceeding in Parliament and that therefore the Board's threat of an action for libel was a breach of parliamentary privilege. The committee added a request that the opinion of the Judicial Committee of the Privy Council should be sought on whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament as a breach of its privileges. The Judicial Committee's opinion was that the House would not be acting contrary to the 1770 Act in doing so. The Committee of Privileges then issued a further report, recommending that no further action be taken (H.C. 227 of 1957–58).

Mr. Butler, who was moving the motion that the House agree with the two reports of the Committee of Privileges, went on to examine some of the issues involved in the case, many of which were again referred to by subsequent speakers. " Our privileges can be extended only by Act of Parliament," Mr. Butler said. " A vote or declaration of a single House of Parliament cannot itself extend privilege, yet, looking back over the centuries, we see that each House of Parliament has claimed, and has frequently exercised, the right to determine the application of its privileges to particular cases. I think the House would be very unwise to deprive itself of that right."

Mr. Butler pointed out that the complexity and difficulty of a Member's life had increased a thousandfold since the passing of the Bill of Rights. There had, for example, been no nationalised industries at that time. While a Member's questions in Parliament were fully privileged, Members were unable to put down questions on the day-to-day administration of the nationalised industries, since such administration did not come within the responsibility of Ministers. The majority of the members of the Committee of Privileges had felt, therefore, that the writing of a letter to a Minister on the administration of nationalised industries might be regarded, in the light of modern circumstances, as a proceeding in Parliament, and, as such, covered by parliamentary privilege. If such were not the case, Mr. Butler said, the Member would be protected in an action for libel by qualified privilege only; that is, privilege would be accorded by the courts provided there was no malice, the burden of proving which would lie on the plaintiff.

Mr. Herbert Morrison, a former Labour Cabinet Minister, moved an amendment to the effect that Mr. Strauss's letter was not a proceeding in Parliament, and therefore the London Electricity Board's chairman and solicitors had committed no breach of privilege. Mr. Morrison observed that it was the term " a proceeding in Parliament " that was the essence of the debate. In the House, Members had complete freedom of speech, which it was vital they should retain; but he had never imagined, before this case arose, that a proceeding in Parliament should extend to a letter sent privately to a Minister of the Crown. That doctrine could be made to apply not only to letters about nationalised industries, but also to those criticising private companies or individuals. When the House was in danger of raising the rights of its own Members markedly above the rights of the ordinary citizen, that was a tendency which could be dangerous to the liberties of the people.

The Attorney-General, Sir Reginald Manningham-Buller, who spoke in favour of the amendment, said that the House was not considering what should or should not be the privileges of Parliament, but what they actually were under the present law. The House could not extend its privileges at its own will, and the meaning of the words " proceedings in Parliament " in the Bill of Rights was a question of law: it would be wrong to give a meaning to a statute which it could not have. It had never been suggested before that letters from Members to Ministers were proceedings in Parliament—Parliament normally would never even know of them.

Three divisions were taken at the end of the debate. In the first, the motion moved by Mr. Butler was defeated by 218 votes to 213; in the second, the amendment tabled by Mr. Morrison was carried by 219 votes to 201; and in the third, the amendment, put as a substantive motion, was carried by 219 votes to 196.

(The above summary is based on Commonwealth Survey, C.O.I., July 22, 1958; 591 H.C. Deb. 208–346, July 8, 1958; see also 210 H.L. Deb. 948–952, July 14, 1958; and above, pp. 88, 288.)

Procedure

Leave of absence (House of Lords). The First and Second Reports from the Select Committee on Leave of Absence have been published. The First Report recommends that peers on leave of absence should be entitled to places for their wives at the State Opening of Parliament and other functions, to the use of the Library, etc., and to copies of Hansard, etc., on application. The Second Report provides for the publication of the names of peers who have been granted leave of absence (H.L. (151) and (170) of 1957–58).

Opening of Parliament. On July 31, 1958, the Prime Minister stated that the Government had agreed in principle that facilities should be granted for televising the State opening of Parliament in 1958 (for statement and discussion see 592 H.C. Deb. 1602–1605; 211 H.L. Deb. 594–596).

Parliamentary questions. On July 30, 1958, the Speaker stated that since the decision of the House on July 8, 1958 (see above under **Privilege**), it had been thought prudent for the Clerks at the Table to cease advising Members, who sought to ask Questions which were inadmissible because they related to the day-to-day administration of nationalised industries, to write to Ministers or Boards. This was a precaution against the possibility of the Clerks being involved in any dispute.

On the same day, the Home Secretary and Lord Privy Seal said that the vote of July 8, 1958, decided that Mr. Strauss's letter was not a proceeding in Parliament and reminded all Members of their individual responsibility to exercise the greatest care in writing to Ministers and to the chairmen of the nationalised boards. No matter how mischievous a constituent's allegations, the Member who forwarded them in good faith was adequately protected. Members should understand that, in the absence of an expressed request to the contrary, Ministers might pass on the contents of their letters or the letters of their constituents to bodies outside the Government service.

(For statements and discussion, see 592 H.C. Deb. 1369–1377; see also 591 H.C. Deb. 1011–1013, July 15, 1958.)

Select Committee. In a Special Report the Select Committee on Procedure stated that they had been unable to complete their inquiry and recommended that a Committee be appointed in the next Session (H.C. 262 of 1957–58; see above, p. 183).

Public Accounts Committee (House of Commons)

Report. The Committee has issued its 3rd Report (on various matters relating to the National Health Service, the Board of Trade, the Ministry of Supply, the Ministry of Agriculture, Fisheries and Food, the Ministry of Transport and Civil Aviation, the Department of Scientific and Industrial Research, the Ministry of Defence, the Navy and Army Appropriation Accounts, the Post Office Commercial Accounts, and Crown Lands) (H.C. 256 of 1957–58).

Statutes

Royal Assent. The Land Powers (Defence) Act, 1958 (6 & 7 Eliz. 2, c. 30) (see above, p. 377), the Opticians Act, 1958 (6 & 7 Eliz. 2, c. 32) (see above, p. 390), the Litter Act, 1958 (6 & 7 Eliz. 2, c. 34) (see above, p. 382), the Physical Training and Recreation Act, 1958 (6 & 7 Eliz. 2, c. 36) (see above, p. 382), the Drainage Rates Act, 1958 (6 & 7 Eliz. 2, c. 37) (see above,

p. 382), and the Defence Contracts Act, 1958 (6 & 7 Eliz. 2, c. 38) (see p. 377), received the Royal Assent on July 7, 1958; the Housing (Financial Provisions) Act, 1958 (6 & 7 Eliz. 2, c. 42) (see above, p. 380), the Public Records Act, 1958 (6 & 7 Eliz. 2, c. 51) (see above, p. 379), the Local Government Act, 1958 (6 & 7 Eliz. 2, c. 55) (see above, p. 384), and the British Transport Commission Order Confirmation Act, 1958 (6 & 7 Eliz. 2, c. xxviii) (see above, p. 397), received the Royal Assent on July 23, 1958; the Tribunals and Inquiries Act, 1958 (6 & 7 Eliz. 2, c. 48) (see below, p. 407), the Finance Act, 1958 (6 & 7 Eliz. 2, c. 56) (see above, p. 396), the Medical Act, 1956 (Amendment) Act, 1958 (6 & 7 Eliz. 2, c. 58) (see above, p. 390), the State of Singapore Act, 1958 (6 & 7 Eliz. 2, c. 59) (see below, p. 422), the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958 (6 & 7 Eliz. 2, c. 64) (see above, p. 386), the Children Act, 1958 (6 & 7 Eliz. 2, c. 65) (see above, p. 381), the Water Act, 1958 (6 & 7 Eliz. 2, c. 67) (see above, p. 386), the Slaughterhouses Act, 1958 (6 & 7 Eliz. 2, c. 70) (see below, p. 404), and the Agriculture Act, 1958 (6 & 7 Eliz. 2, c. 71) (see above, p. 374), received the Royal Assent on August 1, 1958.

See also SUBORDINATE LEGISLATION (below, p. 405).

PUBLIC AUTHORITIES

Bank of England

Report for 1957–58 has been published (Cmnd. 500).

British Phosphate Commission

Report for 1956–57 has been published (Cmnd. 511).

Cable and Wireless Limited

Accounts for 1957–58 have been published, together with the report of the Directors (Cmnd. 502).

Central Land Board

Report for 1957–58 has been published (H.C. 259 of 1957–58).

Cinematograph Films Council

Report for 1957–58 has been published (H.C. 236 of 1957–58).

Council of Industrial Design

Report for 1957–58 has been published (H.M.S.O. 88–1257–0–58).

Forestry Commission

Policy. On July 24, 1958, statements of Government policy on forestry were made in Parliament (592 H.C. Deb. 686–692; 211 H.L. Deb. 180–185).

Report for 1956–57 has been published (H.C. 220 of 1957–58).

General Optical Council

Establishment. See Opticians Act, 1958 (above, p. 390).

Iron and Steel Board

Report for 1957 has been published (H.C. 246 of 1957–58).

National Film Finance Corporation

Debate. On the adjournment on July 15, 1958, the House of Commons debated certain aspects of the report of the Corporation (591 H.C. Deb. 1203–1214; see above, p. 290).

New Towns

Reports of the Cumbernauld, East Kilbride and Glenrothes Development Corporations for 1957–58 have been published (H.C. 252 of 1957–58).

Royal Fine Art Commission

Report for 1957 has been published (Cmnd. 447).

White Fish Authority

Report and accounts for 1957–58 have been published (H.C. 235 of 1957–58).

PUBLIC HEALTH

Regulation

Slaughterhouses. The Slaughterhouses Act, 1958 (6 & 7 Eliz. 2, c. 70), received the Royal Assent on August 1, 1958. The Act provides for the licensing and regulation of slaughterhouses and knackers' yards, for the presenting of a new method of anaesthetising animals for slaughter and for the welfare of those employed in slaughterhouses.

Section 1 contains general provisions for the licensing of slaughterhouses. Section 2 contains special provisions for licensing in cases where local restrictions are in force. Local authorities are to carry out a review of existing slaughterhouse facilities and probable future requirements, and to submit a report to the Minister (s. 3). After the submission of such a report licences will only be issued with the approval of the Minister (s. 4). Slaughterhalls are to be isolated from dwellings (s. 5). Section 6 relates to special grounds for and appeals against certain refusals. The definition of " factory " for the purposes of the Factories Act, 1937, is extended to cover slaughterhouses to secure the welfare and safety of persons employed therein (s. 7). The Minister, after consultation, is enabled to make regulations prescribing an alternative to stunning animals prior to their slaughter (s. 8). Section 9 contains additional provisions as to by-laws and regulations under the Act. Grants for expenses in relation to meat inspection at slaughterhouses may be made to local authorities (s. 10). Section 11 contains provisions as to local inquiries. Section 12 contains financial provisions. Section 13 is an interpretation section. Section 14 contains special provisions for London.

The Act does not extend to Northern Ireland. Except for sections 7, 12 (1), 13 (4), the Act does not extend to Scotland. The Act came into force on August 1, 1958, the date on which it received the Royal Assent.

See also LOCAL GOVERNMENT (above, p. 381).

REMEDIES

Certiorari

R., a bus conductor, was injured when he was assaulted by youths who tried to stop his bus. R. claimed disablement benefit in respect of the injuries which he received. To be entitled to benefit R. had to suffer an injury arising not only in the course of but also out of his employment. It was conceded that the injury arose in the course of R.'s employment; but the Commissioners rejected his claim on the ground that it did not arise out of his employment. R. moved for certiorari on the ground that the Commissioners had wrongly placed the burden of proving that the injury had arisen out of his employment on R. The Divisional Court (Lord Goddard C.J., Slade and Devlin JJ.) *held,* that once there was evidence to suggest that the injury did not arise out of the employment, the burden of proving that it did so arise was on R.: R. *v.* NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER, *ex p.* RICHARDSON [1958] 1 W.L.R. 851; [1958] 2 All E.R. 689 (see above, p. 395).

Declaration and injunction

Following complaints from a member of a film distributors' protection society with regard to discrepancies in the box-office takings at the plaintiff's cinema, an inquiry was held by the society's investigation committee, which was attended by the plaintiff. As a result of the inquiry the society recommended its members not to supply films to the plaintiff. The plaintiff brought an action against the society for a declaration that the recommendation was null and void on the grounds that the proceedings were contrary to natural justice, for an injunction restraining the society from carrying out the recommendation and damages for conspiracy and trespass. *Held*, (1) that the objects of the society and its officers being to protect their own interests and not to injure the plaintiff, the claim in conspiracy and trespass failed; (2) that, although the contractual basis necessary for the obligation to treat a man with natural justice to arise was present, there was no failure of natural justice; accordingly, the plaintiff's claim failed. The remedies by way of declaration or injunction based on a claim that the defendants did not act according to natural justice must have a legal and contractual basis no less than the remedy of damages. The principles of natural justice do not require that a domestic tribunal conduct themselves as a court of law. The only requirements are (1) that the person accused should know the nature of the accusation made; (2) that he should be given an opportunity to state his case; and (3) that the tribunal should act in good faith: BYRNE *v.* KINEMATOGRAPH RENTERS SOCIETY [1958] 1 W.L.R. 762; [1958] 2 All E.R. 579, Harman J.

See also *Att.-Gen.* v. *Smith* (below, p. 407).

SCOTLAND

Education

Debate. On July 24, 1958, the House of Commons debated education in Scotland (592 H.C. Deb. 694–797).

See also COMPULSORY PURCHASE (above, p. 374); LOCAL GOVERNMENT (above, p. 381); NATIONAL HEALTH SERVICE (above, p. 388).

SUBORDINATE LEGISLATION

Consultation

The Joint Parliamentary Secretary to the Ministry of Agriculture, Fisheries and Food gave a list of organisations to which proposals for amendments to Ice Cream Regulations were circulated. There were thirty-one organisations (591 H.C. Deb. 1419–1420, July 17, 1958).

Parliamentary proceedings

Select Committee on Statutory Instruments (House of Commons). On July 8, July 15, and July 22, 1958, the Committee considered 17, 6 and 20 instruments respectively, and resolved that it was unnecessary to draw the special attention of the House to any of them (H.C. 11–XIV, XV XVI of 1957–58).

Special Orders Committee (House of Lords). In the Tenth, Eleventh and Twelfth Reports, the Committee examined ten statutory instruments. The Committee found that one instrument raised important questions of policy or principle, and could not be passed by the House without special attention, that four were not founded on precedent, but that all could be approved without further special inquiry (H.L. (152) (160) (165) of 1957–58).

TOWN AND COUNTRY PLANNING

Agricultural land

Circular. The Ministry of Housing and Local Government has issued a circular on the safeguarding of agricultural land. The circular states:

1. It has for long been among the main objects of planning policy to ensure that valuable agricultural land is not taken for development when less valuable land can reasonably be used instead, and that development which is unnecessarily extravagant in its use of land is not allowed. For this purpose there are standing arrangements for local planning authorities to consult the Regional Land Commissioners of the Ministry of Agriculture, Fisheries and Food both when Development Plans are being prepared and when planning applications affecting agriculture are being considered. The present arrangements were outlined in Circular No. 99 issued by the Ministry of Town and Country Planning on November 24, 1950.

2. The Minister of Housing and Local Government and the Minister of Agriculture, Fisheries and Food have been reviewing these arrangements in the light of the progress that has now been made with the submission and approval of Development Plans, and of the heavy burden of work that is now falling on Regional Land Commissioners in connection with the inspection of proposals under the Government's Farm Improvement Scheme. The object of the review has been to ascertain to what extent the scope of the existing arrangements for consultation could be reduced without prejudice to the policy of safeguarding agricultural land.

3. The Ministers attach special importance to the arrangements under which Regional Land Commissioners are available to act as technical agricultural consultants to local planning authorities during the preparation of Development Plans and the subsequent review of approved Plans. It is proposed that these arrangements should continue unchanged. Regional Land Commissioners will also continue to be available to advise local planning authorities on all applications for planning permission to develop agricultural land submitted by public authorities.

4. It should not normally be necessary for a local planning authority to consult the Regional Land Commissioner where they consider that planning permission should be refused on non-agricultural grounds. The exception is development of land for the purposes of agriculture: in these cases local planning authorities are required under Article 9 (2) of the General Development Order, 1950, to consult with the Minister of Agriculture before refusing permission or imposing any conditions on the grant of permission.

5. Again, consultation with the Regional Land Commissioner should be unnecessary in the ordinary way if permission is sought to develop land allocated for development in an approved or submitted Development Plan, even if the land is agricultural or allotment land. The exception is where there are known to be unresolved objections by the Ministry of Agriculture to particular features of a Plan submitted but not yet approved; here, authorities should consult the Regional Land Commissioner if consent to the application would override these objections.

6. At present Regional Land Commissioners are consulted as a matter of routine in a very large number of cases where private applicants wish to develop (not for agricultural purposes) agricultural land in areas not allocated for development in Development Plans. Many of these applications relate to very small areas where the decision is unlikely to be governed by the agricultural factors. The Ministers think that consultation with Regional Land Commissioners could be discontinued in such cases without prejudice to good planning and the general interests of agriculture. In areas not allocated for development, authorities should continue, however, to consult Regional Land Commissioners—

(i) on all applications by mineral developers;
(ii) on all applications for the development of allotment land;
(iii) on major development proposals in such areas.

7. No hard and fast rule can be laid down as to what constitutes major development in this context, but unless there are special circumstances it should not normally be necessary to consult the Regional Land Commissioner on any application by a private developer involving less than five acres of agricultural land.

8. Ministers recognise, in offering this general guidance to local planning authorities, that it must be left to local authorities' discretion to consult Regional Land Commissioners on particular cases of doubt or difficulty even where the area affected is small—for instance where it is land of outstanding agricultural or horticultural quality, or there are special problems of severance (Part I of Circular No. 43/58).

Enforcement notices

In proceedings before justices by a local planning authority for failure by a landowner to comply with the terms of an enforcement notice, it was contended by the landowner that the notice had not been served on him personally nor left at his usual or last known place of abode within section 105 (1) of the Town and Country Planning Act, 1947, but had been left at his place of business. *Held*, that the notice was properly served: MORECAMBE AND HEYSHAM CORPORATION *v.* WARWICK (1958) 56 L.G.R. 283, D.C.

The plaintiff was served with an enforcement notice under section 23 (1) of the Town and Country Planning Act, 1947, as an occupier of land, requiring him on or before November 7, 1957, to discontinue the use of the land as a caravan park and camp by the removal of all caravans in excess of two in number. The notice was stated to take effect on October 31, 1957. The plaintiff applied by summons under R.S.C., Ord. 54A, r. 1, for a declaration that the notice was void and of no effect in that it failed to comply with the provisions of section 23 (2) and (3) of the Act of 1947. *Held*, that the validity of the notice could not be determined by summons, since the plaintiff was not a person " interested under a . . . written instrument " within Ord. 54A, r. 1, nor " claiming " a " legal or equitable right " which depended on the construction of a statute within Ord. 54A, r. 1A: RIGDEN *v.* WHITSTABLE U. D. C. [1958] 3 W.L.R. 205; [1958] 2 All E.R. 730, Danckwerts J.

The defendant systematically caused plots of land in Egham to be used in succession as caravan sites, for which planning permission was in each case refused, with the deliberate intention of flouting the enforcement provisions of the Town and Country Planning Act, 1947, for as long as possible. The defendant was fined and eventually the Attorney-General, on the relation of the local planning authority, issued a writ for an injunction restraining the defendant from using any land within the district as a caravan site without the prior grant of planning permission. *Held*, that since the defendant's conduct showed an intention to act in defiance of the provisions of the Act of 1947, which was designed for the public benefit, an injunction would be granted: ATT.-GEN. *v.* SMITH [1958] 3 W.L.R. 81; [1958] 2 All E.R. 557, Lord Goddard C.J.

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Tribunals and Inquiries. The Tribunals and Inquiries Act, 1958 (6 & 7 Eliz. 2, c. 48) received the Royal Assent on August 1, 1958.

The Act gives effect to some of the recommendations of the Committee on Administrative Tribunals and Enquiries (Cmnd. 218). Section 1 constitutes a Council on Tribunals to be appointed by the Lord Chancellor, to keep under review the constitution and working of the Tribunals specified in Sched. 1 and to report on particular matters referred to it relating to any tribunals (other than the ordinary courts) or to administrative procedures involving an inquiry or hearing; there is to be a Scottish Committee of the Council appointed by the Secretary of State for Scotland. Section 2 relates to reports of and references to the Council and the Scottish Committee. Chairmen and in certain cases other members of tribunals shall, after the appointed day, either be appointed by the Lord Chancellor (or the Lord President of the Court of Session in Scotland) or be selected by the appropriate Minister from a panel of persons appointed by the Lord Chancellor (s. 3). The Council may recommend persons to be appointed to be members of tribunals (s. 4). No Minister other than the Lord Chancellor may remove a member of a tribunal from office without the concurrence of specified persons (s. 5). Ten years' legal experience is required to qualify for appointment to certain tribunals (s. 6). Section 7 relates to the appointment and qualifications of the General Commissioners of Income Tax after the appointed day. The Council is, after the appointed day, to be consulted before procedural rules are made (s. 8). Section 9 provides for appeals, after the appointed day, on points of law to the High Court from certain tribunals with a further appeal to the Court of Appeal. Other tribunals may be brought within the terms of the Act by the Lord Chancellor and the Secretary of State (s. 10). The High Court may supervise by orders of certiorari or mandamus the proceedings of any tribunal notwithstanding the provisions of any Act (s. 11). After the appointed day reasons for the decision of a Minister or a tribunal must be given if requested (s. 12). Section 13 repeals certain provisions restricting an appeal from the Court of Session to the House of Lords. Section 14 is an interpretation section. Section 15 contains repeals. The appointed day means the day or days appointed for the commencement of the Act by the Lord Chancellor and the Secretary of State (s. 16).

The Act applies with numerous modifications to Scotland and Northern Ireland. Except for sections 3, 7, 8, 9, 12, which will come into effect on a day or days to be appointed, the Act came into force on August 1, 1958.

The House of Commons on July 3, 1958, gave an unopposed second reading to the Tribunals and Inquiries Bill.

" A century ago, even fifty years ago," the Home Secretary and Lord Privy Seal observed during the Commons debate, " the State interfered very little, or came very little, into most people's lives. The ordinary man went about his business in his own way, relying, in a dispute with his neighbours, on the ultimate protection of the law of the land and the impartiality of the courts. Now, for good or ill, the State to a very much larger extent regulates the lives of most people in varying degrees. Ministers of the Crown, and civil servants exercising their Minister's authority, have wide powers to curtail individual liberty. Liberties which have long been cherished—for example, freedom for a man to do what he likes with his land—have been curtailed in the wider interests of the community. I do not say that that is wrong. What is wrong is that the judicial system—the courts of law, tribunals, inquiries—has not been adapted and extended so as to guarantee full protection to the interests of the individual. The zeal for State control and planning has tilted the scales in favour of the State and against the individual citizen. We are now restoring the balance. The Bill may in some ways be complicated, but the idea behind it is very simple: to protect the individual against the arbitrary exercise of the growing powers of the State."

The Home Secretary explained that a great deal had been done, and was being done, by the Government to implement the recommendations of the Franks Committee without asking Parliament to enact general legislation, since many of the recommendations could be put into effect without any changes in the law. This action had been taken by regulations, circulars and administrative action in a wide area of Government activity, including national insurance, military service, health, planning and education. Action had been taken, for example, to remove the bar on legal representation before military service hardship committees (which may grant postponement of call-up on grounds of exceptional domestic, business or other hardship); and regulations were now in force to give a claimant absolute discretion to be legally represented or not before national insurance, industrial injuries and national assistance appeal tribunals.

The Tribunals and Inquiries Bill established a Council on Tribunals, with a Scottish Committee subordinate to it (Clauses 1 and 2), the first duty of which would be to keep under review and report on the constitution and working of the administrative tribunals listed in the First Schedule to the Bill. The basis on which the First Schedule had been compiled, the Home Secretary said, had been " broadly to include all tribunals of the type which the Franks Committee took to be within its purview, that is to say, bodies other than the ordinary courts which hear and determine disputes or differences and which are constituted under an Act of Parliament by a Minister, or for the purpose of a Minister's functions. The First Schedule, however, is not a final list of tribunals to be supervised by the Council. If, at any time, some other tribunal ought to be added to it, either an existing one or a new one, the Lord Chancellor and the Secretary of State for Scotland, with the approval of Parliament, can make additions. . . . The schedule contains the names of over 50 categories of tribunals. Some categories comprise several hundred individual tribunals—a kind of constellation. The supervision which the Council will be called upon to exercise will, therefore, be very extensive indeed. It will have an extremely busy time and it must be allowed a reasonable time to survey its field before it can get down to its work. A single Council is proposed, the reason that a single Council is provided for the whole of Great Britain rather than, as the Franks Committee recommended, a Council for England and Wales and a separate Council for Scotland, is that so many of the tribunals are organised on a basis of Great Britain as a whole and apply a single code of law. Their codes of procedure should also be uniform throughout the country, and this can best be assured by a single Council. The special interests and peculiarities of Scotland will be looked after by the Scottish Committee of the Council which, although subordinate to the Council, will none the less have the right to make its report direct to the Secretary of State for Scotland if, for any reason, the Council does not adopt that report. The interests of Wales will be amply safeguarded by direct representation in the membership of the Council." The second main duty of the Council would be to report on particular procedural matters in relation to any tribunal or to statutory inquiries. It would be open to the Ministers concerned (the Lord Chancellor and the Secretary of State for Scotland) to seek the Council's advice on questions of procedure at inquiries. The Bill also provided for the Council to consider and report upon particular and important questions of procedure at inquiries on its own initiative. The Bill empowered the Council to make general recommendations on the membership of tribunals (Clause 4) and to act as consultant to the rule-making authorities (that is, the Ministers responsible) on rules of procedure for them (Clause 7). The Council would submit an annual report on its proceedings and those of the Scottish Committee to the Lord Chancellor and the Secretary of State for Scotland, who would lay the report before Parliament with such comments, if any, as they thought fit (Clause 2).

Other clauses of the Bill conferred on the Lord Chancellor, or the Lord President of the Court of Session in Scotland, responsibility for appointing chairmen of tribunals, who up till now had been appointed by Ministers (Clause 3); and required the Lord Chancellor's or Lord President's consent to the dismissal of members of tribunals (Clause 5). Chairmen of certain appellate tribunals would be required to have legal qualifications (Clause 6). Clause 8 provided for appeal on a point of law from decisions of certain tribunals to the High Court or Court of Session. Clause 9 empowered the Lord Chancellor and the Secretary of State to extend the provisions of the Bill to additional tribunals. Clause 10 removed statutory bars to the supervisory jurisdiction of the High Court and Court of Session. Clause 11 repealed certain restrictions on appeals from the Court of Session to the House of Lords (590 H.C. Deb. 1609–1693, July 3, 1958).

Circular No. 38/58 of the Ministry of Housing and Local Government concerns making available the report of an accompanied visit made by an officer of the Department in connection with an appeal under the Town and Country Planning (Control of Advertisements) Regulations. In respect of an accompanied visit which takes place after July 14, 1958, on appeals under these Regulations, the letter giving the Minister's decision on the appeal will state that any recipient may obtain a copy of the officer's report if a request is made for it within one month of the date of the letter. The Minister regards it as important that the statement of reasons given by a local planning authority for refusing consent or granting consent subject to conditions for the display of an advertisement shall be full enough to give the applicant adequate understanding of these reasons.

Part II of Circular No. 43/58 of the Ministry of Housing and Local Government deals with the application of paragraphs 14 and 15 of Circular No. 9/58 (see above, p. 188), to the practice of the Ministry of Agriculture, Fisheries and Food. To make the position clear in future, the Circular provides that the following should be observed:

(1) If the Regional Land Commissioner's final views on a case are adverse to an applicant he will always embody them in an official letter, which may be quoted by the authority if they refuse consent, as part of their statement of reasons for refusal. If these views are quoted in the authority's statement of reasons an officer of the Ministry of Agriculture will be available to attend any appeal inquiry arising from such refusal, as explained in paragraphs 14 and 15 of the circular.

(2) If the Regional Land Commissioner comes to the conclusion that, from the standpoint of the public agricultural interest, the case is not one in which the Minister of Agriculture would desire to express any positive views, he will inform the local planning authority of this conclusion in an official letter. This will cover not only development for non-agricultural purposes, to which the Minister of Agriculture does not object, but also those developments for agricultural purposes which the Minister does not feel that he should actively support, but which are not, in his view, detrimental to agricultural interests. If the local planning authority then refuse consent to the development on planning grounds, they may refer to the letter in their statement. An officer of the Ministry of Agriculture will not, however, attend any appeal inquiry which results in such a case, since no positive views for or against the proposal in the public agricultural interest have been expressed by that Department. It must be clear at any inquiry in such a case that the attitude of the Minister of Agriculture is one of neutrality and that the objection to the development proposed is taken on planning grounds.

(3) If, in the case of development for agricultural purposes, the Regional Land Commissioner supports the proposal, it will normally follow that the local planning authority grant permission and no appeal will arise. The consultation will therefore usually be on an informal basis.

(4) If in any case the views of the local planning authority and the Regional Land Commissioner cannot be reconciled after consultation—*i.e.*, if the local planning authority wish to permit development to which the Commissioner maintains objection, or if they wish to disallow development for agricultural purposes to which the Commissioner maintains support—the matter will normally have to be called in by the Minister for determination by himself, after a local inquiry at which the opposing views will be represented.

Circular No. 51/58 of the Ministry of Housing and Local Government refers to Circular No. 9/58 (see above, pp. 186–190) and relates development plans and proposals for alterations or additions to a development plan. Local planning authorities are reminded of the importance of giving publicity to their proposals and of being ready to explain them to those concerned. In future, if the Minister proposes to make any modifications to a development plan, the proposed modifications will be published and twenty-one days allowed for the lodging of objections. The Circular authorises the procedure that will be followed. The Inspector's report will be made available to those interested when the decision on the plan is announced.

Agricultural Land Tribunals

Areas. Regulations have been issued to amend the Agriculture (Areas for Agricultural Land Tribunals) Order, 1948, by dividing the Yorkshire and Lancashire Area into two separate areas—the Yorkshire Area (comprising the administrative counties of the three ridings of Yorkshire) and the Lancashire Area (comprising the administrative county of Lancaster) (S.I. 1958 No. 1174).

Powers. See Agriculture Act, 1958 (above, p. 374).

Disciplinary bodies

Optical Committees. The Opticians Act, 1958, requires the General Optical Council to establish an Investigating Committee and a Disciplinary Committee (see above, p. 390).

Potato Marketing Board. The disciplinary committee of the Potato Marketing Board imposed penalties upon M. (i) for obstructing officers of the Board in their attempt to check the acreage of potatoes grown on M.'s farm, and (ii) for failing to comply with a demand requiring M. to furnish the Board with information relating to the potatoes which he had planted, and also the total arable acreage of his farm. The chairman of the committee was paid a fee by the Board for his services. M. appealed from the committee's award by way of a special case stated. *Held*, (1) that the committee had had jurisdiction notwithstanding the fact that the chairman of the committee was paid for his services; (2) that the power of the Board to enter upon and to inspect land included the power to measure the land; (3) that although the Board had asked for more information than that to which they were entitled, the excess was severable from their entitlement; (4) that the court had no power to remit a special case under section 8 of the Agricultural Marketing Act, 1949, to the committee for further consideration, as the general powers of remission contained in section 22 of the Arbitration Act, 1950, did not apply to such a case: POTATO MARKETING BOARD *v.* MERRICKS [1958] 3 W.L.R. 135; [1958] 2 All E.R. 538, Devlin J.

Domestic tribunals

See *Byrne* v. *Kinematograph Renters Society, Ltd.* (above, p. 405).

Lands Tribunal

See Land Powers (Defence) Act, 1958 (above, p. 379).

National Health Service Tribunal

Decision in the case of *Glamorgan Executive Council* v. *Dr. Theodotus John Sumner* has been published. The Tribunal directed (a) that the respondent's name should be removed from the Medical List of the Glamorgan Executive Council; and (b) that the respondent's name should not be included in any corresponding list kept by any other Executive Council under Part IV of the National Health Service Act, 1946 (E.C. No. 87).

National Service

Umpire's decisions. Four selected decisions by the Umpire in respect of applications for postponement of liability to be called up for service under the National Service Acts, 1948–55, have been published by the Ministry of Labour and National Service (N.S. Code 2 Pamphlet No. 2/58 containing Decisions Nos. 132/58, 176/58, 224/58, 229/58 N.S.).

WALES

Local Government

Advisory Committees. The Minister of Housing and Local Government gave the list of committees which advised the Government about matters broadly affecting Wales as a whole. There were, in addition, advisory committees concerned with particular responsibilities in particular localities (591 H.C. Deb. *73–74*, July 14, 1958).

WIRELESS AND TELEVISION

Independent Television Authority

Agreement. By an agreement under seal a programme contractor was to provide programmes to be broadcast by the Independent Television Authority. Broadcasting was to commence on a date between August 15, 1955, and November 15, 1955, to be determined by the authority by giving notice to the contractor, and the contract was to continue until July 29, 1964. The contractor was to pay the Authority a fee of £495,600 per annum until March, 1958, or the expiration of 2½ years from the commencement of broadcasting, whichever was the later, and a fee of £536,900 thereafter. These payments might be increased or decreased in accordance with an index of retail prices published by the Board of Trade. Stamp duty was assessed on the basis of the *ad valorem* stamp duty chargeable on a " bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods " under Sched. 1 to the Stamp Act, 1891, and the amount was computed on the total of the sums specified as annual fees for the period November 15, 1955, to July 29, 1964. *Held*, that since the agreement was a security within Sched. 1 to the Stamp Act, 1891 (notwithstanding that the agreement was not collateral, but itself created the obligation, and although it dealt with the provision of services for a consideration and was an executory contract at the time of execution), and since the duty was to be computed on the total amount under the agreement (notwithstanding that the specified sum might be subject to an increase or decrease in certain circumstances) the stamp duty had been properly assessed: INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED REDIFFUSION *v.* I. R. C. [1958] 1 W.L.R. 943; [1958] 3 All E.R. 126, Wynn-Parry J.

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial development. The Return of Schemes made under the Colonial Development and Welfare Acts by the Secretary of State for the Colonies, with the concurrence of the Treasury, for 1957–58, has been published (H.C. 223 of 1957–58).

Aden

Federation. Talks on setting up a federation of States in the Western Aden Protectorate ended on July 15, 1958. A statement issued by the

Colonial Office said that the United Kingdom Government had informed the five Rulers that they welcomed the proposal and agreed that the step " would be in the best interests of the Rulers and their peoples," and that the Government would give military and financial assistance to the new federation when it was established (Commonwealth Survey, C.O.I., August 5, 1958).

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Basutoland

Constitutional reform. The National Council has been considering a report on constitutional reform. The recommendations and views of the High Commissioner are awaited (592 H.C. Deb. 1563–1564; for debate, see 1768–1785, July 31, 1958; see also 592 H.C. Deb. *234–238*, August 1, 1958).

Bechuanaland

Constitutional advance. Proposals have recently been debated in the Joint Advisory Council. The recommendations and views of the High Commissioner are awaited (for references, see **Basutoland**).

Borneo

Boundaries. An Order in Council has been made defining the boundary of the waters and Continental shelf of the Colony of North Borneo in and in the neighbourhood of Brunei Bay (S.I. 1958 No. 1517).

British Guiana

Constitutional advance. The Secretary of State for the Colonies made the following statement, on July 18, 1958, about talks which had been held at the Colonial Office:

" In the course of the discussions, I informed the delegation that I had taken note of the recent resolution of the Legislative Council of British Guiana, requesting me to receive a representative delegation from the Legislative Council to discuss proposals for constitutional advance. I have learnt, with approval, that all political thinking in the territory was agreed that any new constitutional instruments for British Guiana should contain safeguards of the Western democratic freedoms, which are the basis of the life of the British Commonwealth. I am therefore asking the Governor to set up a constitutional committee in British Guiana, representing wide interests in the territory, to recommend what form constitutional advance from the present interim arrangements should take. I hope that, thereafter, I shall be able to arrange to receive a representative delegation to discuss the recommendations. When I have approved the proposals in principle, new constitutional instruments would be drafted, to take effect in time for the general elections which would normally follow the four-year term of office of the present Legislative Council of British Guiana. In that period the determination of new electoral boundaries, and the preparation of comprehensive electoral rolls would also be carried out. In the meantime, as soon as the agreed recommendations of the committee are known, I hope and believe that the flexibilities of the present constitution would allow preparations for the statutory advances which were to come " (591 H.C. Deb. *131–133*, July 18, 1958).

Report. The Colonial Report, 1957, has been published by the Colonial Office.

Cameroons

Report of H.M. Government to the General Assembly of the United Nations, for 1957, has been published (Colonial No. 340).

Christmas Island

An Order in Council has been made to place Christmas Island under the authority of the Commonwealth of Australia with effect from October 1, 1958. This transfer of authority from the United Kingdom Government necessitates the enactment of certain transitional and consequential provisions contained in sections 4 to 11 and the Schedule (S.I. 1958 No. 1515; and see above, pp. 99, 301).

Cyprus

Developments. On July 24, 1958, the Secretary of State for Colonial Affairs said in the House of Commons:

" Since the beginning of June there has been grave deterioration in the internal situation in Cyprus. Disorders have been largely communal, but the campaign of intimidation and murder by the terrorist organisations has continued, and members of the British forces have also been murdered. Between June 1, and July 22, 95 people have been killed in Cyprus and over 170 wounded. Violence between Greeks and Turks has reached a peak in the past 12 days, during which 51 people have been killed and over 80 wounded. The ceaseless activities of the security forces alone prevented the slaughter from assuming even more serious proportions. This outbreak of violence, which was not restrained by appeals for peace and order made by the Governor and the community leaders, reinforced by appeals made on all sides in Parliament, confronted the Governor with the gravest threat to peace in the history of our administration of Cyprus. The information which the Governor had lately been receiving showed it was part of EOKA's plan to attack the Turkish Cypriot community as such, and not merely by way of reprisals for acts of communal violence, and that EOKA was on the point of commencing widespread sabotage and attacks on the security forces. The Turkish Cypriots, at the same time, have been threatening further attacks on the Greeks, and the Turkish leaflets were inciting more communal violence, and also violence against the Government. To meet this grave situation, the Governor, with the full approval of Her Majesty's Government, gave orders for the arrest and detention of a large number of EOKA supporters and of known Turkish Cypriot terrorists and trouble-makers. Over 1,400 Greek Cypriots and 50 Turkish Cypriots have been arrested. TMT—the Turkish terrorist organisation—has been proscribed. These measures will be followed up with determined action against anyone, of either community, who resorts to violence, and by all measures necessary to restore order. . . . Both Houses of Parliament felt that Her Majesty's Government's recently declared policy should be given a fair chance. This was also the view of our NATO allies. That policy included an invitation by my right hon. Friend the Prime Minister to meet the Prime Ministers of Greece and Turkey. Naturally, the Prime Minister deeply regrets that more progress has not been made with regard to his declared wish to have personal talks, at the earliest possible date, with the Prime Ministers of Greece and Turkey. This invitation is still open. Meanwhile, there has been, of course, continuous diplomatic activity " (592 H.C. Deb. 678–682).

On August 15, 1958, the Prime Minister issued the following statement:

" On June 19, 1958, the Prime Minister presented to Parliament a statement of the policy which Her Majesty's Government intend to pursue in regard to the Cyprus problem for a period of seven years. This policy was explained by the Prime Minister to the House of Commons in broad terms, and its outline and main practical features were described in the Parliamentary statement of policy of June 19, 1958 (Cmnd. 455). As Parliament was informed, the policy has been the subject of friendly and confidential consultation and discussion within the North Atlantic Treaty Organisation. In the last few days, the Prime Minister has had the opportunity of personal meetings, in Athens and Ankara with the Prime Ministers of Greece and

Turkey, which have enabled him to acquaint himself, at first hand, with the views of their respective Governments. After the most careful consideration of the views expressed to him by the Prime Ministers of Greece and Turkey, and in the light of the advice tendered by the Governor of Cyprus regarding the situation in the island, Her Majesty's Government have decided to proceed to give effect to the policy as announced to Parliament in the following manner.

"An order-in-council has already been approved, authorising the preparation of electoral rolls in the island. This is expected to take two or three months. Meanwhile, in accordance with the spirit of the decision whereby the communities are encouraged to order their own communal affairs, the Governor will, where local circumstances make this desirable, authorise the establishment of separate Greek and Turkish Cypriot municipal councils. When the electoral rolls are complete, it will be possible to hold elections for the two Houses of Representatives. The preparations for the elections should involve consultations between the Governor and leaders of the two communities. If, as Her Majesty's Government earnestly hope, violence ceases, this will make possible the return of those at present excluded from the island, in order that they may play their part in these electoral processes, and in consultations on the details of the system of representative government and communal autonomy set out in the statement of policy. As soon as the Houses of Representatives have been elected, they will be asked to elect their representatives to the Governor's Council, which will then become the authoritative body to deal with all matters not specifically devolved upon the Houses of Representatives or reserved to the Governor at his discretion. With regard to the representatives of the Greek and Turkish Governments as proposed in the statement of policy, Her Majesty's Government feel, on reflection, that the representatives of other sovereign powers could not suitably sit as members of the council under the chairmanship of the Governor. It would be more correct to regard them as specially appointed representatives of their countries with direct access to the Governor and such other facilities as they need to carry out their functions. Accordingly, Her Majesty's Government invite the Governments of Greece and Turkey to appoint their representatives with effect from October 1. The establishment of this system of communal assemblies charged with certain specific functions, and of the Governor's Council, charged with other more general duties, does not exclude and should, with general goodwill, facilitate the development of some form of representative institution serving the interests of the island as a whole. As regards the proposal for dual nationality, it does not appear that there is need for urgent action in this matter. Further inquiries have revealed that any special provision of this kind would require carefully devised legislation in view of the complexities of international law. It is, therefore, wiser to defer action pending the consideration of the legal and other aspects. Finally, Her Majesty's Government appeal with confidence for support from all concerned for the two major concepts which underlie their policy. The first is a period of calm and the cessation of violence in the island. The second is the deferring, for a period of seven years, of any final solution without prejudice to the future or to the views and aspirations of any parties concerned. At the same time such a period cannot be a period of stagnation. Her Majesty's Government feel that the form of growth and development which they propose is one suited to the needs of the moment and in conformity with the two principles which appear to be generally accepted by all concerned."

Sir Hugh Foot sent a copy of Mr. Macmillan's statement to Archbishop Makarios accompanied by the following letter:

"I am sure you appreciate how important the statement is, and realise that this gives us all an opportunity—perhaps the last opportunity—of making a fresh start in the endeavour to bring peace and progress to Cyprus. I realise, from the discussions I have had with you, that there are aspects of the new policy with which you disagree, but I most earnestly urge you not to throw away this opportunity of working together in a spirit of compromise and co-operation. If this chance is not seized at once, I can foresee nothing but continuing misery for Cyprus. But, if we all now decide to sink the differences of the past, and work together in mutual understanding and confidence, I feel sure that we can achieve a period of good order and good sense, which can save the island from further conflict, and lay the foundations for a final and just settlement in due course. A great responsibility rests on us all to put first the interests of the people of the island, and to that overriding purpose I am pledged."

The Archbishop's reply on August 16, was as follows:

"I have carefully studied the statement of the Prime Minister of Britain, a copy of which you kindly sent me in advance, as well as your accompanying message. I am sorry to see that the statement, apart from slight modifications, is, in effect, a restatement of the policy announced on June 19, 1958, which has already been rejected. I am also painfully astonished to notice that it is proposed to proceed with the imposition of a plan unacceptable to Cypriot people in their large majority. It should be made abundantly clear that the Greek people of Cyprus can never accept a plan which disregards their basic democratic rights and denies to them both freedom and peace. For freedom is frustrated in a plan which imposes outside Governments over the heads of the people of Cyprus, and which breaks up their unity by means of a constitution of division, calculated to prejudice the final issue. Peace, on the other hand, would be lost for the island by a régime permanently establishing differences and divisions, and thereby setting the stage, not for unity and co-operation, but for accentuated antagonisms and strife, with wider repercussions. It is our earnest wish and aim to see conditions of peace and harmony return to the island. Your urge, therefore, for the sinking of differences and co-operating in mutual understanding and confidence, meets with my wholehearted response. May I, however, point out the wide disparity between the positive nature of your verbal plea for co-operation, and the negative objectives of a divisive constitution based on mistrust and separation, which you, in practice, support. In these circumstances I feel I must earnestly emphasise the unwisdom of a policy of enforcing a plan against the will of the people, and the grave consequences involved, for which responsibility rests on the British Government. Finally, I must place on record our profound disappointment that the moderation we have shown in a spirit of goodwill and compromise, in order to reach agreement upon a transitory period of self-government, has met with no understanding and no response whatsoever from the British Government, whose policy has proved to be devoid of all sincerity or purpose. The people of Cyprus will not accept any arbitrary and unilateral decision, and are now, more than ever, intent on asserting their right to self-determination and achieving freedom."

(See also 210 H.L. Deb. 692–768, July 8, 1958; 210 H.L. Deb. 1106–1117, July 15, 1958.)

Report. The Colonial Report, 1957, has been issued by the Colonial Office.

Gambia

Civil aviation. An Order has been made to amend the Colonial Civil Aviation (Application of Act) Order, 1952, so as to empower the Governor-General of Nigeria and the Governors of Sierra Leone and the Gambia to make licensing regulations for air transport and commercial flying in those territories (S.I. 1958 No. 1514).

Gibraltar

Report. The Colonial Report, 1957, has been issued by the Colonial Office.

Grenada

Report. The Colonial Report, 1955 and 1956, has been issued by the Colonial Office.

Hongkong

Report. The Colonial Report, 1957, has been issued by the Colonial Office.

Kenya

Debate. On August 1, 1958, the House of Commons debated the political and economic problems of East and Central Africa (592 H.C. Deb. 1823–1866).

Native areas. An Order in Council has been made to alter the constitution of the Native Lands Trust Board and makes special provision to allow for the registration of private rights of ownership of lands in the Native Lands. Some minor and consequential amendments have also been made to the Kenya (Native Areas) Order in Council, 1939 (S.I. 1958 No. 1049).

Malta

Constitution. The Secretary of State for the Colonies said on July 31, 1958, that the Government proposed to invite members of the Maltese political parties to discussions in November, 1958 (592 H.C. Deb. 1605–1616).

Nigeria

Civil aviation. See **Gambia** (above, p. 416).

Civil service. It is announced in a White Paper on Her Majesty's Overseas Civil Service, issued in July, that a new approach to the problem of civil service staffing in the territories which comprise the Federation of Nigeria has been found necessary, and that proposals have been made to the Nigerian Governments for the establishment of a new special list of overseas officers, to be known as Special List B.

A scheme to establish a special list of officers who would be in the service of the United Kingdom Government, and seconded to the Nigerian Government employing them, was part of the policy set out in a White Paper on the Overseas Civil Service (Cmd. 9768; see [1956] P.L. 253), issued in May, 1956, a policy which the Overseas Service Act, 1958, was designed to implement. Special list agreements were signed with the four Nigerian Governments in June, 1957, and overseas officers in the service of the Nigerian Governments were invited to join the special list. " It is now clear," the recent White Paper says, " that the terms and conditions of service laid down in these agreements are not generally attractive to overseas officers serving in Nigeria, and less than 400 officers out of the 2,000 eligible to join the special list have so far applied to do so. Moreover, the great majority of these applications are from officers in the Federal and Northern Regional public services who, under the terms of the agreements with those Governments, will have the right to revert to the local public services and to retire with lump-sum compensation."

The new proposals aim to give the overseas officer greater incentive to continue serving in Nigeria. In brief, the United Kingdom Government proposes that those overseas pensionable officers whose names are admitted to Special List B should be required to give at least one year's notice of their intention to retire; that they should be entitled to receive interest-free advances of 90 per cent. of their entitlement to compensation, the cost to be shared equally between the United Kingdom Government and the Nigerian Government concerned; that the United Kingdom Government should agree to waive repayment of part of the advance made to each officer under the age of 44, depending on the officer's age and his length of service after the introduction of the relevant compensation scheme; that for older officers there should be a generous extension of "freezing" privileges (*i.e.*, the holding of entitlement to compensation at its maximum point for a number of years), the cost of which would be met largely, and in some cases wholly, by the United Kingdom Government; and that, until the compensation schemes come into force in the north and the Federation, there should be a scheme of interim advances to officers there.

As in the existing special list, it is proposed that the pensions, gratuities and compensation due to officers or their dependants should be paid by the United Kingdom Government and recovered from the Nigerian Government concerned. It is also proposed that the Nigerian Governments should undertake to provide fair and reasonable conditions of service, which would, in any case, be not less favourable than those at present in force. In all other respects, the officers concerned would continue to be members of the public service of the Nigerian Government concerned, save that an officer would have a right of appeal to the United Kingdom Government against any disciplinary decision which might affect his eligibility for lump-sum compensation or pension.

The White Paper states that the Governments of the Federation of Nigeria and of the Northern Region have indicated their acceptance, in principle, of these proposals, whereas the Governments of the Western and Eastern Regions have proposed certain modifications, which are now under consideration.

The cost to the United Kingdom Government of these proposals, if they were acceptable in full to all the Nigerian Governments, and the majority of overseas officers took advantage of them, is estimated to be £1 million in the current financial year and £1½ million in the next year; thereafter diminishing sums would be required. It is not yet possible to say, the White Paper continues, what the effect will be of the modifications proposed by the Governments of the Western and Eastern Regions, but it seems likely that, if modifications are made in the sense they propose, the scheme will be less attractive to overseas officers in these Regions, and the cost to the United Kingdom Government would be reduced (Cmnd. 497; 592 H.C. Deb. 1790–1793, August 1, 1958; Commonwealth Survey, C.O.I., September 2, 1958).

An Order in Council has been made to make provision for special retirement benefits for officers in the public services of the Western and Eastern Regions of Nigeria in accordance with the recommendations of the Nigeria Constitutional Conference held in London in May and June, 1957, and makes fresh provision for the retirement benefits of officers in the public services of the Federation of Nigeria and the Northern Region of Nigeria (S.I. 1958 No. 1523).

Constitution. An Order in Council has been made to amend certain provisions of the Nigeria (Constitution) Order in Council, 1954, relating to the legislatures established by the Order, the Executive Council of the Southern Cameroons, officers in the public services of the Federation and the Regions of Nigeria, powers in relation to prosecutions and the Council of Chiefs of the Southern Cameroons and revokes certain transitional provisions. It also validates the appointment of a judge of the High Court of Lagos (S.I. 1958 No. 1257).

An Order in Council has been made to amend the provisions of the Nigeria (Offices of Governor-General and Governors) Order in Council, 1954, as amended, relating to the constitution of offices for the Federation of Nigeria and for the Southern Cameroons, powers of pardon and the discharge of the functions of the Commissioner of the Cameroons (S.I. 1958 No. 1258).

An Order in Council has been made to amend the Nigeria (Constitution) Order in Council, 1954, as amended, to provide that for the purposes of the Order the office of a Parliamentary Secretary to a Regional Minister shall not be considered to be an office in the public service of a Region, to provide for the appointment of persons to be temporarily members of the Council of Ministers in certain circumstances, and to provide that the Governors of the

Western and Eastern Regions may delegate their powers of appointment and dismissal of certain officers connected with the courts of those Regions (S.I. 1958 No. 1522).

Among the recommendations contained in the *Report of the Commission appointed to inquire into the fears of Minorities and the means of allaying them,* which was published on August 19, 1958, are the following: no new State should be created in any of the three Regions of Nigeria; a single Nigeria police force should serve both the federation and the Regions; " special areas " and " minority areas " should be set up to deal with the problems of minorities; and certain fundamental rights should be included in the constitution.

The commission, which was in Nigeria from November 23, 1957, to April 12, 1958, held 61 public sittings in Lagos, the Federal capital, in various towns of the three Regions, and in Buea in the Southern Cameroons. At public sittings 819 persons came forward to give evidence, and minutes of the evidence taken were made available to counsel who appeared before the commission representing various interests. Private meetings were also held with representatives of the Federal and with the Regional Governments, and with other organisations, as well as with individuals.

The commission ruled that the word " minorities " meant ethnic or religious minorities of a permanent nature, and therefore it was not prepared to hear political parties in opposition, except in so far as their evidence threw light on the fears of either ethnic or religious minorities. Where, however, members of a tribal majority in a Region were a minority in a minority area, as, for example, Yorubas in the area proposed for a mid-west State, and Ibos in the Calabar-Ogoja-rivers State, they would have the status of a minority within that area. It was also ruled that a sect within a religious majority would not be heard as a religious minority.

In each of the three Regions of Nigeria, the commission found either a minority, or a group of minorities, who described fears and grievances which they felt would become more intense when the present restraints were removed, and who suggested as a remedy a separate State or States. In each Region, however, the members of the commission decided that a separate State would not provide a remedy for the fears expressed. " In considering the problem within each Region," says the report, " we were impressed by the fact that it is seldom possible to draw a clean boundary which does not create a fresh minority." Moreover, " a new State created today would have to compete with the existing Regions and the cost in overheads, not only financial but in resources—particularly of trained minds—would be high. . . . It would be a pity if, at the moment when Nigeria achieved independence, separate States had been created which enshrined tribal separation in a political form that was designed to be permanent." The true safeguard of minorities is seen as the working of the democratic machinery; as the influence of the federal government increases, so it will become increasingly important for each party to win every vote it can. Therefore, no further delegation of powers to the Regions should take place.

In Nigeria, at present, there are the Nigeria police force, which is federally administered, and various forces of local government police. The police in Nigeria are concerned not only with the prevention and detection of crime but (much more frequently than is usual in the United Kingdom) with the maintenance of law and order, with the control of public meetings and political processions and the like. The commission emphasised that " no better means of allaying the fears of minorities can be found than the retention of a single strong police force not subject to purely Regional control." Therefore, " there should be one Nigeria police force which should serve both federal and Regional purposes." The Regional Governments should share with the Federal Government financial responsibility for the Nigeria police force into which the local forces should ultimately be absorbed.

The commission also recommended that there should be provision in the constitution for special areas and minority areas, the difference between them lying in the extent to which the federal government would play a part in their affairs. In special areas there would be a board which would initiate schemes to supplement the normal development of the area. In minority areas there would be a council, with a chairman nominated by the Regional government, and members, of whom a considerable element would be elected from the area. The duties of the council would be to bring to the notice of the Regional government matters affecting the well-being, cultural advancement, and economic and social development of the minority areas. In respect of both special areas and minority areas, annual reports would be laid on the table of the Federal House of Representatives and the Regional House of Assembly, and opportunity provided for debate.

The commission recommended that, for the present, the area of the Niger Delta between Opobo and the mouth of the Benin River should be designated "special." This area, which extends into both the Eastern and Western Regions, is inhabited mainly by some 330,000 members of the Ijaw tribe, and is divided by creeks and inlets of the sea and of the Niger into many small islands which nowhere rise above the highest tides and floods. The Ijaws are said to have lived in the territory now called Nigeria longer than any of the large tribes, and were probably pushed down into the Delta area in times of which no record has survived. The commission was confronted with the Ijaws' "almost universal view that their difficulties were not understood at headquarters in the interior."

Two minority areas, it was suggested, should be set up—in the Edo-speaking area round Benin and in the old Calabar Province.

The commission recommended that a number of fundamental rights, based mainly on the Convention of Human Rights signed in Rome in November, 1950, should be embodied in the constitution. Although "provisions of this kind are difficult to enforce and sometimes difficult to interpret . . . their pressure defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed." They include such provisions as the right to life and liberty, protection against slavery, freedom of movement and peaceful assembly, and protection against discrimination and retrospective legislation.

Among the other recommendations made are: that there should be a commission for the conduct of elections; an independent body, such as a judicial service commission, for appointments to county and district courts; that control of prisons should be centralised; that Regional Governments should retain the power to supersede a native or local government authority; and that prerogative writs or some comparable procedure should be reintroduced in the north if the administrative power of review disappears. In respect of Moslem law, it is suggested, among other points, that it would reduce the fears of minorities if non-Moslems were given the option of being dealt with by non-Moslem courts, and that a Regional service of *alkalai* (judges in Moslem law) should be instituted, who would be appointed and administered by a judicial service commission.

On the difficult problem of the dispute between the Northern and Western Regions regarding the Ilorin and Kabba divisions (which are now part of the Northern Region and are claimed by the West), the commission recommended that there should be no change in the boundary, except as the result of a plebiscite; that a plebiscite should be held if there is general agreement on this at the 1958 conference in London and that it should be binding; and that, in any area transferred, at least 60 per cent. of the votes cast must have been in favour of transfer (Cmnd. 505; Commonwealth Survey, C.O.I., September 2, 1958).

Reports. The Report of the Fiscal Commission has been published (Cmnd. 481).

The Colonial Report, 1955, has been published by the Colonial Office.

Pacific Islands

An Order in Council has been made to amend the Pacific Order in Council, 1893, by replacing the provision enabling the High Commissioner for the Western Pacific to make regulations by new provision. It also amends that Order so as to enable High Commissioner's regulations to establish courts inferior to the High Commissioner's Court and to restrict appeals from that court to the Fiji Court of Appeal in certain cases, and makes provision for the removal of doubts regarding the validity of certain existing regulations (S.I. 1958 No. 1519).

Rhodesia and Nyasaland

Constitution. The Secretary of State for the Colonies said on July 10, 1958, that all seven African provincial councils had met to debate the Northern Rhodesia Government's proposals for constitutional changes. Dissatisfaction was expressed by four councils and in the three others certain aspects were welcomed (591 H.C. Deb. 557–558).

During a debate on August 1, 1958, the Secretary of State informed Members of the action which he proposed to take with regard to introducing constitutional changes in Northern Rhodesia.

The changes would be introduced in two stages: the first would involve making an order-in-council during the parliamentary recess, to enable the Government of Northern Rhodesia to proceed with the registration of voters and with the delineating of constituencies. This order would, however, be tied to a second order-in-council making the remaining provisions, including the actual provisions for holding elections. So that Parliament might have the opportunity of debating the new constitution, if Members so wished, the second order would not be made until after the House re-assembled in October. In the meantime, the Secretary of State would publish a White Paper setting out the whole scheme of constitutional change, so that Members would have time to consider it and to decide whether to press for a debate. This plan, said Mr. Lennox-Boyd, " would ensure that effect could not be given to the changes at all until there had been an opportunity for debate; but, on the other hand, there is the very considerable advantage that, if Parliament does decide that this is a good plan and should go forward, precious time in the summer would not have been wasted. It would then be possible to proceed with the introduction of the changes without them having been unnecessarily delayed. If, on the other hand, Parliament does not think this is a good plan, the only harm which will have been done will be that a great deal of work by busy people in Northern Rhodesia will have been wasted " (592 H.C. Deb., 1823–1866).

The Electoral Provisions Order in Council was made on September 11, 1958 (S.I. 1958 No. 1520).

The White Paper setting out the full proposals was published in September (Cmnd. 530).

Guarantee. The Treasury has issued a statement of guarantee on a loan to be made to the Federation of Rhodesia and Nyasaland by the International Bank for Reconstruction and Development (H.C. 268 of 1957–58).

Report. The Colonial Report for Nyasaland, 1957, has been published by the Colonial Office.

St. Helena

An Order in Council has been made to amend the Eastern African Court of Appeal Order in Council, 1950, by conferring jurisdiction on the Eastern African Court of Appeal to hear and determine appeals from St. Helena and its dependencies (S.I. 1958 No. 1255).

An Order in Council has been made to amend the Eastern Africa (Appeal to Privy Council) Order in Council, 1951, so as to include the Colony of

St. Helena and its dependencies amongst the territories to which that Order applies and to make special provision with regard to the time within which applications for leave to appeal shall be made and security shall be given in the case of proceedings originating in St. Helena and its dependencies (S.I. 1958 No. 1256).

St. Lucia

Report. The Colonial Report, 1955 and 1956, has been published by the Colonial Office.

Sarawak

Boundaries. An Order in Council has been made to define the boundary of the waters and continental shelf of the Colony of Sarawak in and in the neighbourhood of Brunei Bay and in the neighbourhood of Tanjong Baram (S.I. 1958 No. 1518).

Report. The Colonial Report, 1957, has been published by the Colonial Office.

Sierra Leone

Civil aviation. See **Gambia** (above, p. 416).

Constitution. The proposals for change in the composition and functions of the Executive Council were brought into effect on August 14, 1958, when the first all-African Council was sworn in (see 591 H.C. Deb. 560, July 10, 1958; and above, pp. 307–308).

An Order in Council has been made to reconstitute the Executive Council and the House of Representatives of Sierra Leone by removing the ex-officio Members from each body and by increasing the minimum number of Ministers in the Executive Council from four to eight (S.I. 1958 No. 1259).

An Order in Council has been made to make provision for the amendment of the Sierra Leone Protectorate Order in Council, 1951, in certain respects (S.I. 1958 No. 1260).

An Order in Council has been made to amend a typographical error in the Sierra Leone (Constitution) Order in Council, 1958 (S.I. 1958 No. 1524).

Singapore

Constitution. The State of Singapore Act, 1958 (6 & 7 Eliz. 2, c. 59) received the Royal Assent on August 1, 1958. The Act provides for the establishment of the State of Singapore and for its government. Section 1 provides that Her Majesty may by Order in Council to be laid before Parliament make such provision as may appear to be necessary or expedient for the peace, order and good government of the territories formerly comprised in the Colony of Singapore. The constitution order may provide for the revocation or amendment of existing Orders in Council but thereafter no order shall be made except for such purposes (s. 1 (2)). The constitution order may authorise the revocation or amendment of any of its provisions but apart from this it may only be revoked or amended by Act of Parliament (s. 1 (3)). Supplemental and transitional provisions may be made by Order in Council (s. 1 (4)). The Act came into force on August 1, 1958.

An Order in Council has been made to enable elections for the Legislative Assembly to be set up under the proposed new Constitution for Singapore to be held before that Constitution comes into operation; to make provision regulating those elections; and to provide for the qualification and disqualification of persons for election to the first Legislative Assembly to be summoned under the proposed new Constitution (S.I. 1958 No. 1521).

Report. The Colonial Report, 1956, for the Colony has been published by the Colonial Office.

Somaliland

A Commissioner on Somalisation has been appointed and will be assisted by both Somalis (official and non-official) and expatriate members of the commission. The commission is to determine the number of officers who will be needed and to assess the extent to which such requirements are likely to be met by the promotion of serving officers and the recruitment of Somalis; and to recommend improvements in existing educational and training arrangements.

Swaziland

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Tanganyika

Debate. See **Kenya** (above, p. 417).

Report by H.M. Government to the General Assembly of the United Nations has been published (Colonial No. 339).

Uganda

Constitution. An Order in Council has been made to replace the existing provision in the Uganda Order in Council, 1920, which establishes a Legislative Council in and for the Protectorate and also makes a minor amendment to that Order. Provision is also made in the Uganda Order in Council, 1902, safeguarding the tenure of office of judges (S.I. 1958 No. 1516).

Debate. See **Kenya** (above, p. 417).

West Africa

An Order in Council has been made to amend the West African Court of Appeal Orders in Council, 1948 to 1957, so as to permit acting appointments as members of the court of persons who are qualified for appointment as judges of the Supreme Court of either of the Territories (S.I. 1958 No. 1525).

BOOK REVIEWS

Bureaucracy in New Zealand. Edited by R. S. Milne. [London: Oxford University Press. 1957. 137 pp. 20s.]

In 1957, the New Zealand Institute of Public Administration brought before its Convention an experienced Minister of the Crown, several senior civil servants, lawyers and political scientists, and set them to draw out Leviathan with a hook, for the purposes of clinical examination—to talk with the Convention about bureaucracy, or, more specifically, the exercise of administrative discretion in New Zealand. The papers presented and summaries of the discussion are collected together in the book under review.

Problems of the bureaucracy are perhaps of special interest to New Zealanders; it is common knowledge that for a long period in that country the State has intervened actively in economic and social affairs and today the Central Government Departments employ 129,000 people, in a total population of about 2¼ million. Furthermore, as Professor Milne points out in his Introduction, " because of the absence of large private firms and the weakness of local government, the State organisation stands out like a colossus." [1]

As was probably to have been expected, the reputation of the civil service suffered only minor damage in the course of the Convention's investigations. The speakers advanced the by now conventional defences of administrative methods and discretion, and described civil service procedures which are for the most part in the realm of the orthodox. We are hardly surprised to learn that administrative discretion is both considerable and unavoidable, or that much responsibility for the formation of policy rests with professional public servants. The Gog and Magog of departmental tyrant and manipulated Minister were dutifully set up and methodically knocked down.

But though much of the book is unexciting, it is not without interest for the reader outside New Zealand.

In Mr. Cooke's paper " The Rights of Citizens," he will find a review of leading cases in the modern administrative law of New Zealand, in which the changing attitude of the Supreme Court to administrative discretion is traced. He will discover, for example, that in 1924 the Supreme Court of New Zealand adopted a wide interpretation of " judicial " for the law of prerogative writs contemporaneously with, but apparently quite independently of, the English Court of Appeal [2]; that a New Zealand court was prepared to extend the absolute privilege of the judiciary to a District Manpower Officer exercising judicial functions [3]; and that the " turn of the tide " suggested by such cases as *Vine* v. *National Dock Labour Board*, *R.* v. *Northumberland Compensation Appeals Tribunal*, and *Prescott* v. *Birmingham Corporation* [4] has its counterpart in New Zealand.[5] The paper demonstrates for those not already convinced of it that much of administrative law within the Commonwealth deserves to be treated as a whole, and not as a random collection of national patterns. Mr. Cooke considers and rejects the suggestion for the creation of a supreme administrative tribunal.

Courts have limited means for overseeing bureaucracy. Just as important as judicial review, if not more so, are the internal checks, the built-in stabilisers of the administrative machine, and the overall notion of ministerial responsibility.

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[1] p. 4.

[2] *N. Z. Waterside Workers' Federation* v. *Frazer* [1924] N.Z.L.R. 689; compare *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.

[3] *Keenan* v. *Auckland Harbour Board* [1946] N.Z.L.R. 96.

[4] [1957] A.C. 488; [1952] 1 K.B. 338; [1955] Ch. 55.

[5] *N. Z. Dairy Board* v. *Okitu Co-op. Dairy Co., Ltd.* [1953] N.Z.L.R. 366; *N. Z. United Licensed Victuallers Assoc.* v. *Price Tribunal* [1957] N.Z.L.R. 167.

The former derive largely from system and tradition, and Mr. P. B. Marshall, a senior civil servant, dealt with these in what to this reviewer was one of the most stimulating papers of the Convention, "The Professional Ethics of Administrative Discretion." He stressed how far the service is obliged to adopt "the methodology of the administration of law,"[6] how much the exercise of administrative discretion is quasi-judicial,[7] how necessary and inevitable it is that principles should grow up to expedite the decision-making process.[8] He commended the idea of attaching advisory committees to departments, while warning against the dangers of "publicity campaigns." For the New Zealand public servant the existence of a professional code of ethics is seen to be of particular importance, because it is not a service which is entered only after entrance examination; such examinations (Professor Milne had suggested[9]) would "offend" New Zealand notions of equality. An unfortunate typographical error has robbed us of Mr. Marshall's last two lines on p. 123.

Ministerial responsibility was the subject of the Hon. J. R. Marshall's paper, "Political Controls." Mr. Marshall has held Cabinet rank since 1949 and was appointed Deputy Prime Minister in October, 1957. He contended that Ministerial responsibility had been effective in controlling bureaucracy in New Zealand, though its effectiveness varied from Minister to Minister and Administration to Administration. Two further points will interest his oversea readers. First, his comments on the New Zealand tradition of direct accessibility for the public to Ministers (another manifestation of the prevailing egalitarianism of a small community): "It is effective in the control of the abuse of power and in the checking of maladministration. It is *not* very effective in securing the reversal of decisions."[10] Secondly, his description of the New Zealand method for screening proposed departmental regulations: "The present Government provides a check against the abuse of delegated legislation by requiring all regulations to be approved by the Attorney-General before being submitted to Cabinet. It is one of the time-consuming and often tedious, but important, tasks that I have—to read the draft regulations submitted by the departments through their Ministers and to ensure that the regulations are within the authority of their statute and are clear, certain and general in their application."[11]

Professor Milne, who edited the book, contributed an introductory paper on "The Inevitability of Administrative Discretion," in which he set the New Zealand scene and introduced the questions with which the Convention was to be concerned, together, of course, with the views of his own suggested in the title he chose.

Mr. Frederick Baker, a senior civil servant, had long been in a position to observe closely the Minister-Permanent Head relationship, and this he discussed in his paper "Public Servants as Ministerial Advisers." He examined the factors which may bear upon their relationship and concluded that any general rule laying down a clear-cut division of functions would be unworkable. One suspects that he voiced a widely-held civil service view on the New Zealand "democratic" tradition of direct access to Ministers when he commented: "I am afraid that over a number of years many Ministers have rather encouraged this development. While the follow-up action on many of these, on the assumption that they are typical cases, could be the means of ensuring that the right *general* approach is being made by the department in handling its duties, too often the Minister is too busy to use them in this way. . . . More important, by becoming immersed in detail, he simply has not the time to sit back and review the work of his department objectively. . . . The Permanent Head, too, in the circumstances I have described, is liable to become enmeshed in detail in the same way. . . . In this way the direction of the whole organisation can suffer, and in such circumstances 'no rule' can become the general rule." [12]

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[6] p. 119.

[7] p. 120.

[8] ". . . the daily operations performed in pursuance of a policy should be made as clear-cut and routine as it is possible to make them. Only by formulating definite rules is it possible to free the executives from a mass of detail. . . . In commercial or factory language, the department's operations should be put on an assembly-line basis as far as possible. But a result of such machine-like operations, which are an essential concomitant of efficient administration, is that the subordinate officer whose actions or decisions are in terms of the rules cannot possibly deal with the case which the rules do not cover. Because he cannot do so he is often classified as a bureaucrat. But that charge should be levelled rather at the higher official strata—whose responsibility it is to exercise administrative discretion, if, without due cause, they fail to do so" (pp. 127–128).

[9] p. 4.

[10] p. 61; original italics.

[11] pp. 58–59; Mr. Marshall was appointed Attorney-General and Minister of Justice in 1954.

The spokesman for the man in the street at the Convention was Mr. D. J. Riddiford, a lawyer by profession, who presented "A Citizen's Point of View." He discussed at some length the lessons to be drawn from the Crichel Down affair. Neither parliamentary questions nor the tradition of direct access provided adequate protection to the individual: in the name of Democracy, the people "insist on bringing their personal grievances to the personal notice of Ministers, and in fact by the mere physical inroads on the Ministers' time and energy leave the latter incapable of making policy. It is wrong to think there is adequate criticism of government, either in its parliamentary or its bureaucratic sphere, by the people who pester Ministers. The people who wear out the carpets in the Ministers' anterooms are, ninety-nine times out of a hundred, concerned with some purely sectional grievance or personal interest. Criticism of government in Parliament time and again misses the major issues. The attitude of a woefully ill-instructed public colours the tone of parliamentary debates, which reflect the ignorance of the public instead of enlightening it." [13] The civil service needed more adequate direction, and he advocated to this end the restoration of a Second Chamber to the New Zealand Parliament. The service itself could be improved in quality by the establishment of an administrative division "in which one-quarter should be University graduates of the highest calibre." [14]

The reader may find it rather ironic that it was the representative of John Citizen himself who proved in the end most critical of the consequences of that egalitarianism which has shaped the whole New Zealand governmental tradition.

ROBIN L. SHARWOOD.

CONSTITUTIONAL PROBLEMS IN PAKISTAN. By SIR IVOR JENNINGS. [London: Cambridge University Press. 1957. xvi and 378 pp. 42s.]

CONSTITUTIONAL LAWS OF THE COMMONWEALTH: VOLUME ONE: THE MONARCHIES. By SIR IVOR JENNINGS. [London: Oxford University Press. 1957. xxiv and 496 pp. 50s.]

IT would be a great pity if the title of *Constitutional Problems in Pakistan* should deter those interested in constitutional law and theory who do not aspire to a detailed knowledge of Commonwealth constitutions other than their own. For Sir Ivor Jennings here provides for just that class of readers an utterly absorbing account of how basic constitutional problems of *general* interest and importance have arisen—and arisen dramatically—in Pakistan since independence. The cases he presents raise issues which transcend the local difficulties just as much as did the celebrated South African cases beginning with *Harris* v. *The Minister of the Interior,*[1] and, equally with these, cannot safely be ignored by any serious student of the subject.

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[12] pp. 43–44; original italics. The Hon. J. R. Marshall had disclosed that he had seen "only ninety-six private individuals or deputations . . . by appointment" in the previous three months, but thought other Ministers may have seen more (p. 65).

[13] p. 80.

[14] p. 76.

Sir Ivor has allowed the documents to speak for themselves, and after seventy-five pages of Introduction, the book consists of the judgments delivered in the Federal Court of Pakistan in the litigation which followed the dissolution of the Constituent Assembly of Pakistan in October, 1954.[2] Questions considered closely in a series of long, literate and able judgments (particularly in those of Muhammed Munir C.J. and Cornelius J.) included: the concept of the Commonwealth, the nature of Dominion status, the nature of the " independence " of India and Pakistan, the meaning of " sovereignty," Royal assent to legislation, the office of Governor-General, the dissolution of a representative assembly, prerogative powers in time of emergency and " the law of necessity." The cases are followed by a useful Index.

In his Introduction, Sir Ivor sets out to give the uninitiated the necessary background information, and to lead him through—or at least into—the extraordinary tangle in which the Pakistani constitutional lawyers found themselves enmeshed. These seventy-five closely written pages, in the author's most concise style, are not easy going, essential though they may be, and after a first reading which left him almost as bewildered as enlightened this reviewer found it better to proceed to the cases themselves and to make copious back-reference to the Introduction as he went along. For the cases themselves are fascinating, and we owe a great debt to Sir Ivor for extracting them from law reports to which many would have no access and making them available to us in the present form. The book should be in the library of every teacher of constitutional law.

Unfortunately, one cannot be quite so enthusiastic about the other volume by Sir Ivor Jennings here reviewed—*Constitutional Laws of the Commonwealth: Volume 1, The Monarchies,* being the third edition of a book first published in 1938 (as *Constitutional Laws of the British Empire*). Volume 2 will deal with the Republics of the Commonwealth.

It is a case-book, rather along the lines of Keir and Lawson,[3] divided into a number of chapters containing extracts from decided cases and introductory notes. Following chapters upon " The Territories of the Commonwealth," " The Constitutions of the Commonwealth," and " Independent Status," separate treatment is given to Canada, Australia, New Zealand, South Africa, Ceylon and (good heavens!) the Republic of Ireland (" The Republic of Ireland is neither part of the Commonwealth nor ' foreign ' to it and appears to be in what might be described as a purgatory of its own—if that word had no theological implications," p. 386). A number of constitutional documents are collected in an Appendix; the book is indexed.

This reviewer's criticism is not confined to the decision to classify Ireland as a Volume One Monarchy rather than a Volume Two Republic, which is of minor importance, at least on this side of the Irish Sea. Admirable though the intention to provide source books on Commonwealth constitutional law may be, this particular volume seems to fall between two stools: the selection of material is such that to serious students of a particular constitution it will be inadequate and to others misleading; neither class of readers has been well served.

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[1] [1952 (2)] S.A. 418; *sub nomine Harris* v. *Dönges* [1952] 1 T.L.R. 1245.

[2] *Federation of Pakistan* v. *Moulvi Tamizuddin Khan* (1955), *Usif Patel* v. *The Crown* (1955), *Special Reference No. 1 of 1955, Federation of Pakistan* v. *Ali Ahmad Hussain Shah* (1955).

[3] *Cases in Constitutional Law* (4th ed., 1954).

Consider, for example, the chapter on the Constitution of the Australian Commonwealth. Not one case is given to illustrate the great expansion of Commonwealth jurisdiction at the expense of the States which has occurred under the " defence power," despite the fundamental and lasting effects of such expansion on the federal balance; the note at the head of the chapter cannot be said to right this omission when it fails to mention the great cases arising out of and subsequently to World War Two, culminating (it might be thought) in the massive and crucial judgments of the *Communist Party* case[4] (which also bears upon the extent of executive power and the position of civil liberties in Australia). In the field of trade and commerce, at least one notable recent decision is neither included nor referred to—that of the Judicial Committee in *Hughes and Vale Pty., Ltd.* v. *New South Wales*,[5] in which a series of cases upholding state transport regulation was overturned after a re-examination of the implications of section 92 of the Constitution—a decision of the deepest significance. (It should be noted that the *Banking* case[6] is extracted, at pp. 326–335, although by oversight it does not appear in the Table of Contents.) Another absentee is *Att.-Gen. for Australia* v. *The Queen*,[7] the epoch-ending decision in which much of the Commonwealth industrial arbitration system was invalidated, although as the High Court judgments were handed down on March 2, 1956, they may not have been available to Sir Ivor in time. (His Preface is dated November, 1956, but notes: " this volume deals with the various constitutional laws as they were in the earlier months of 1956," p. vi.) A glance at Professor Sawer's *Cases on the Constitution of the Commonwealth of Australia* will indicate the nature of the task which the editor has here attempted to undertake in a chapter of seventy pages. Yet room was found for the early trilogy of *D'Emden* v. *Pedder*, *Webb* v. *Outrim* and *Baxter* v. *Commissioners of Taxation*,[8] an editorial decision which, in the circumstances, this reviewer finds hard to understand.

One must therefore regretfully and respectfully record that this volume is of limited usefulness; indeed the moral is, perhaps, that a source-book which is not comprehensive is worse for the reader than none at all. " Drink deep, or taste not the Pierian spring," as Pope would say. Sir Ivor should aim higher in his next edition, even at the cost of dividing the Monarchies.

ROBIN L. SHARWOOD.

THE SCOTTISH OFFICE. By SIR DAVID MILNE, K.C.B. [London: George Allen & Unwin, Ltd. 1957. (The New Whitehall Series.) 211 and (Appendices and Index) 20 pp. 21s.]

THE general shape and pattern of the Whitehall Series, whether old or new, is well enough known to need no comment, and generally this volume conforms to pattern. Conformity could not be rigid because the Scottish Office itself does not conform to the usual pattern of either English or United Kingdom Offices. The peculiarities of the Scottish Office must certainly have made the preparation of the book difficult since almost the whole range of Government services had to be covered. Compression was inevitable if length was to be reasonable, and the general picture which emerges will be useful to many inside and outside Scotland. The " reasonably comprehensive account " which was Sir David Milne's objective has been attained. History is combined with present practice, and what is more, the whole account makes easy reading, the account being enlivened by pleasant quotations and turns of phrase. A lawyer might have wished that room had also been found for Lord Cockburn's summary of the admittedly anomalous system of governing through the Lord Advocate—" Literally everything depended on a few lawyers, a class to which in modern times Scotland owes a debt of gratitude which does not admit of being exaggerated "—even if the commentator was not without bias.

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[4] (1950–51) 83 C.L.R. 1.

[5] [1955] A.C. 241.

[6] [1950] A.C. 235.

[7] In the High Court of Australia (1956) 94 C.L.R. 254; before the Judicial Committee of the Privy Council [1957] A.C. 288.

[8] (1904) 1 C.L.R. 91; [1907] A.C. 81; (1907) 4 C.L.R. 1087.

This volume in the series has the added value that Scottish administration is linked to that of the United Kingdom, differences are pointed out, and often explained with point and brevity, the status of teaching hospitals, the absence of river boards are examples (though the absence of a system of State scholarships is simply noted). There is too often more than meets the eye at first, the linking of the price guarantee and production grant systems in relation to upland farms is a good example. When all is said, however, the book remains one which describes functions. In some ways it does not go as far as one could wish in showing how these functions are in fact exercised. How many supervision orders have been made upon farmers? Who is it in St. Andrew's House who will finally decide upon a compulsory purchase order? are the sort of questions for answers to which many students might turn to this book, but often they will find no answer. Answers are often available to such questions. Much information on the inner working of the Government machinery is, for example, to be found in the evidence given to such bodies as the Franks Committee or the Select Committee on Nationalised Industries. The information is, however, widely dispersed and often only found by chance. Even granted the restrictions under which a Civil Servant author must work, it seems a pity then that, on occasion, such information which must be better known to the authors of this series than to any other person is not more freely given. On this occasion the regret is perhaps all the greater because the book as it stands shows how such material can be used without making heavy labour of the text.

What has been said relates mainly to the Scottish Office proper. It must be added that with equal skill the minor departments in Scotland are covered so are also the functions of the Law Offices. One Appendix shortly summarises the history of the Scottish Boards, the other lists major office holders, so that the picture of central government in Scotland is made complete.

J. D. B. MITCHELL.

SOME COMPARATIVE ASPECTS OF IRISH LAW. By A. G. DONALDSON, LL.B., PH.D. [Durham N. C. and London: The Duke University Press and Cambridge University Press. 1957. 269 pp., and 12 pp. (Bibliography), and 9 pp. (Index). 45s.]

THIS is the third book in the series of Commonwealth Studies published by Duke University. In part it is based upon lectures given in that University, but those lectures have been rounded off by other material. It is perhaps unfortunate that the title does not clearly indicate the scope and subject-matter of the book. Admittedly it would be difficult to find a short compendious title for it, but the present one might cause some to pass over the book unaware of its real scope and usefulness. Basically the book is a discussion of certain branches of, and developments in, Irish law. The comparative element is present, but it does not predominate. It is used to make the framework for the Irish material and often to suggest comparisons which others can pursue for themselves. The hard discussion is of the Irish material itself, and that discussion is for the most part in the field of public law.

Three chapters are devoted to constitutional history, to Ireland and the Commonwealth and to developments since 1920. The remainder deal with legal history and legal systems, with administrative law, and finally with land law. Even the last chapter has a distinct " public " flavour because of its concern with land purchase schemes. The scheme of the book is ambitious, it deals with Ireland as a whole, and deals with it with an air of detachment which can be illustrated by the reactions to the Bills of 1912 and 1913 and the Act of 1914—" This tendency to extra-constitutional activity is one which appeared before, and which was to recur." This detachment does not mean that the book is in any way " cold." Indeed, it is remarkably readable as well as lucid, and although it covers a great deal of ground does not stay upon the surface—thus particular aspects of the doctrine of precedent are examined in some detail.

It is true that on occasion one might wish for rather more fullness in the treatment of some of the cases, and brevity may sometimes lead to arguable statements. It is not clear, for example, that it was held in *Lockwood's* case that instruments of the type that were in question were immune from judicial control. In other cases an expanded discussion might effect apparent comparisons. Thus the political characteristics of the Northern Ireland Parliament could have a greater influence on the work of the Joint Select Committee on Delegated Legislation than might appear at first sight, and could be the main cause of differences in methods of operation as compared with the Westminster Committees. Within the size of the present book perhaps such things could not be avoided. Certainly they do nothing to spoil the effect of the book; by it the reader is stimulated and put upon inquiry, and is left admiring Dr. Donaldson's control of his material.

J. D. B. MITCHELL.

ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION. By MILTON HANDLER. [Columbia University Press; Oxford University Press. 1957. 151 pp. 24s.]

THIS aptly-titled book contains the substance of three lectures delivered at the University of Buffalo by Milton Handler, Professor of Law in Columbia University. The text runs to seventy pages, and is followed by an equal number of pages of references and notes.

The three lectures provide a lucid and stimulating review of the American approach to the monopoly question and of the vast body of case law which has accumulated since 1890. On many of the basic issues Professor Handler cuts through the tangle of trees to reveal the main features of the wood, and there is a skilful blending of short essays on historical developments with commentary on some of the latest decided cases. Though it provides an excellent review of a vast subject by an authoritative guide, it is at the same time much more than this. It is a well-argued plea that, in assessing various restrictive business arrangements (exemplified here by exclusive dealing contracts and mergers), the courts should adopt a rule of reason whose " scope and significance should be measured by the statutory purposes it [the legislation] is designed to effectuate," *i.e.*, the preservation and promotion of competitive markets. He is against doctrines of *per se* illegality when applied to arrangements such as exclusive dealing and mergers which may, depending upon circumstances and conditions, either reduce or increase competition, though he has no quarrel with such doctrines when applied to trade practices, like price fixing, which he holds, with the courts, to be " inherently antithetical to the precepts of a competitive order."

B. S. YAMEY.

LAW AND STRUCTURES OF SOCIAL ACTION. By KENNETH S. CARLSTON, Professor of Law at the University of Illinois. Published under the auspices of the London Institute of World Affairs. [London: Stevens and Sons, Ltd. 1956. xii and 288 pp. 35s.]

THIS book is about Organisation Man (although Professor Carlston denies his existence in the Western Democracies). All law, he seems to say, is public law: rules of administrative convenience which govern relations within or between the groups in which men are organised. The State is only one such group, no more divine than Sears, Roebuck. Professor Carlston discusses the rules that should regulate the conduct of both.

He argues that the world will go from bad to worse while law is technically inadequate to settle discontents and disputes. He does not, however, reject law for more "realistic" procedures, but tries to show how law can be made realistic. Professor Carlston is at his best when insisting that every problem should be treated on its merits, unobscured by conceptualism or the misuse (by which is meant the ordinary lawyer's use) of precedent. (The clumsy model of law as prophecy could be replaced, though.) He considers that a sort of "field theory," although still far from completion, will be needed to transfer conflicts now found under traditional and often irrelevantly determined classifications into their living setting, as a first step to their settlement. For example, the relationship between States, much more complicated than the rules of international law indicate, is not that of independent, sovereign entities, however much States may hold the posture of gladiators, but "a web composed of many interlacing threads, each creating a stress upon and each being supported by others."

All this is quite sensible, if not very new. The book, however, has serious faults. The ideas are not always consistent: incisive criticism of all systems of universal values (p. 186) is hard to reconcile with admiration (p. 114) for the "extraordinary sweep" with which another distinguished lawyer, Professor M. S. McDougal, proposes eight basic "goal values" for the world community.

This may be piety, but surely primitive law, Roman law, English law also deserve well of Professor Carlston? In fact, the account of the institutionalisation of rules of conduct is hasty and inaccurate. It is unhelpful to write about primitive law without some explanation of what is meant by a primitive society. Snippets from the views of the nature of law held by Malinowski (the last man to be quoted in this way) are set down dogmatically. The spirit of Roman law is never recalled; the corpus lies sadly mutilated. Feudal law gets two pages: Professor Carlston should explain what he means by a feudal State. Kern's theories on fealty, feudalism, prerogative are ignored. English law is treated illogically: "[the] task . . . was to transform a system of law based on an agricultural society to that of a mercantile and industrial society . . ." and unhelpfully: "[the] King spoke in his curia, in his council and finally in the Parliament of the three estates of King, Lords and Commons."

In general, Professor Carlston cannot tell a good story, and a lot of this book is narrative. But the stubborn reasoning from his chosen premises is quite well done.

There are some small textual slips. Perhaps Sir Courtenay Allen (p. 5, n. 7) could be persuaded to sit as supreme administrative court of appeal.

D. J. BENTLEY.

THE POLITICS OF INEQUALITY—SOUTH AFRICA SINCE 1948. By GWENDOLEN M. CARTER, M.A.(Oxon.), PH.D.(Radcliffe). Professor of Government, Smith College, Northampton, Mass. [London: Thames & Hudson. 1958. 535 pp. 63s.]

THIS book—a political history of South Africa since the Nationalists came to power in 1948—is important and deeply interesting. Professor Carter visited the Union in 1948 and returned for more than a year's field research in 1952 under a grant from the Rockefeller Foundation. In addition she appears to have read everything that has been written on the subject in the English language, and the twenty-eight page bibliography appended to her book is both testimony to her own industry and a valuable guide to other students of South African affairs.

Professor Carter divides her text into six sections. The first (" The Setting ") outlines the situation when the Nationalists assumed power. The second section (" Imposing the Nationalist Pattern ") sketches the legislative record of their ten years of office. Of particular interest to readers of this Journal will be the description of the various statutes implementing the apartheid policy (Chap. 3) and the admirable account of constitutional crisis stemming from the efforts to remove the Cape Coloured voters from the common electoral roll (Chap. 4). The third section (" Why the Nationalists Won in 1953 ") is a detailed analysis of the 1953 elections on the lines of the Nuffield College studies of British post-War elections. This is followed by a description (" Nationalist Afrikanerdom ") of the National and Afrikaner Parties and of the various groups which sustain them (the Broederbond, the Federation of Afrikaner Cultural Organisations, the Reddingsdaadbond, the Institute of Christian National Education, the South African Bureau of Racial Affairs, and the Dutch Reformed Churches). This account of what may loosely be termed Nationalist pressure-groups is among the most interesting and revealing parts of the book. In the fifth section similar treatment is given to the Opposition parties—the United Party, the Torch Commando, Labour, Liberals, Union Federalists and Conservatives—and to the Non-European Political organisations, in particular to the African National Congress whose growing influence the Government are desperately seeking to break. In the final section (" South Africa and the World ") Professor Carter deals with the international reactions, especially within the United Nations, to South African racial policies, and with the likely course of future developments.

The text is followed by numerous charts and appendices giving details of such matters as the circulation and distribution of the South African newspapers, the election expenditure of the political parties in the last two elections, and the constitutions and programmes of the various parties and groups. Included is the Freedom Charter of the Congress of the People which is the ostensible basis for the mass Treason Trial now taking place.

The result is a mine of information, much of which has not before been accessible. Anyone familiar with conditions in the Union will appreciate the difficulties with which Professor Carter was faced in making a pioneer study of this sort. A comment in her Introduction is revealing: " Typical of my difficulty in securing printing material," she says, " was the time when I called for a collection of documents which an African lawyer had agreed to lend me only to find that it had been carried away with miscellaneous other papers on a casual police raid the night before." Nevertheless, she has succeeded in amassing an immense amount of material and in presenting it clearly and well arranged. It is, perhaps, to be regretted that the book is so large and exhaustive that it is unlikely to be read as widely as it should be. The text alone cannot be much short of 300,000 words and only the serious student of government is likely to plough through all these. Professor Carter is obviously conscious that the text may be regarded as overloaded, but she has deliberately chosen to write a detailed and comprehensive work of reference for the serious student, to whom it will be invaluable, rather than a work of popular appeal. Nevertheless, there is much here that should be read by everyone who takes an intelligent interest in what is going on in one of the storm centres of the world. Certainly all should study the final chapter (" Where is South Africa going? ") which contains a well-balanced assessment of the likely course of events. Here, Professor Carter finds some slight signs of hope which might halt the " increasing polarisation of sentiment which could all too easily bring the Union into the situation of an armed camp in which all non-Europeans are so antagonistic to the Whites that the latter feel forced to stand together on all counts as the only hope of self-preservation." But she concludes with the inevitable question: How long? The point of no-return may have already been passed; if not, a study of this book may help to persuade white South Africans that standing together on a policy of repression is the surest road to self-destruction.

Professor Carter's study brings out very clearly a number of points of undoubted validity and general interest; the increasing stratification of South African society; the failure of the South African press to help the various groups to understand one another better; the difficulties of a party whose programme is essentially empirical when faced with another with a logical and coherent policy; the handicap suffered by a party whose voting strength is wasted by an overwhelming preponderance in urban areas; the impossibility of political survival in the absence of a definite programme on the racial issue (so clearly illustrated by the history of the short-lived Torch Commando); the impossibility of reconciling "ideal" apartheid with the economic realities, and the present artificiality of life in the Union. This artificiality inevitably casts its shadow over this book. As Professor Carter says (at p. 417): "Throughout much of the discussion of South African affairs in this book the non-Europeans have been virtually disregarded. This is because, in practice, they have relatively little to say about the political, economic or social policies which affect their lives. Yet in the end they will be the most important factor of all in determining the future of South Africa." Professor Carter, however, has not disregarded the non-Europeans to anything like the same extent that the average white South African would have done. As she rightly says: "Perhaps my greatest advantage in studying South Africa was that because I was a foreigner I was able to move from group to group as no native-born South African can do." One of the tragedies of South Africa is that its conventions preclude mobility by those who live there, yet induce the belief that only those who do live there can understand its problems. This book may help to confound that belief. Certainly no one can write it off as the ill-informed criticisms of a biased ignoramus. It is a work of deep scholarship which states the irrefutable facts and, when it passes judgments, does so with caution and restraint—judgments which are quite as critical of the United Party as of the Nationalists.

If, as may well be the case, what is wanted in South Africa is more information and less polemics, Professor Carter has supplied the information. But will it be heeded by those who have power in that beautiful but divided land?

L. C. B. GOWER.

LAW IN THE MAKING. By SIR CARLETON KEMP ALLEN, M.C., Q.C., D.C.L., HON.LL.D.(GLASGOW), F.B.A., J.P. Sixth Edition. [London: Oxford University Press. 1958. xxxix and 643 pp. 50s.]

THE subject-matter of this book, the sources of law, makes it to a certain extent immune from the dangers of premature senility brought about by new decisions and statutes. We are not therefore surprised to find that the changes in this, the sixth edition, prepared only seven years after the fifth, are not of a substantial nature. This review will, however, be confined to making some brief mention of the most important of the passages which have been either rewritten or added to the text. The status of the book is such that any discussion of its well-known arguments would be superfluous and presumptuous.

Notably the treatment which has been given to the realist movement (*i.e.*, the American school—no mention is made of the Swedish realists) is much fuller and less harsh than in the previous edition. The author acknowledges that there has been a modification of the early exaggerated views which reduced law to a "jumble of uncoordinated happenings." The movement, he says, is capable of contributing to the understanding of law "as a living force in society." The sceptical attitude towards legal rules is the one which prevents the stagnation of the law and is the right attitude for the legal and social reformer. This is not to say that the author is wholly uncritical. He considers that there is still over-emphasis on the "dramatic incidents" of law and a danger of the accumulation of facts and figures without their interpretation and evaluation. He doubts, too, whether anyone really believes in the certainty of law which the realists are so vehement in attacking. But that the goal is unattainable does not mean that it is not to be sought with diligence.

It is the desire for certainty which leads the author to welcome, in a new passage, the cases of *Morelle* v. *Wakeling* [1955] 2 Q.B. 379, and *Bryers* v. *Canadian Pacific Steamships, Ltd.* [1957] 1 Q.B. 134. These decisions hold that lack of best argument or a point not being taken in an earlier case could not amount to an " invalidating incuria," and the author considers that they serve as a " timely warning " against the undermining of the doctrine of *stare decisis* by the extension of the doctrine of *per incuriam.* No alteration has been made in the paragraph immediately before this new passage and this leads to inconsistency. Thus, for example, at p. 241 we find the remark of Lord Goddard C.J. in *Nicholas* v. *Penny* [1950] 2 K.B. 466, in which he expressed his opinion that if " material cases " were not brought to the attention of a court then the court would not be bound by that decision in a later case because of the rule in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718. " This interpretation of it is likely to be accepted in the future." At p. 243 *Bryers*' case is quoted with approval, but no reconciliation of this decision with Lord Goddard's dictum is attempted. This can probably be explained by the recent date of *Bryers*' case but the difficulty for the reader still remains.

A further new mention of incuria is made at p. 247. It follows a discussion of *Glasgow Corporation* v. *Central Land Board,* 1955 S.L.T. 155, which decided that the Scots law relating to the privilege of Crown documents differed from the English; this in spite of the assumption made to the contrary by the House of Lords in *Duncan* v. *Cammell, Laird & Co.* [1942] A.C. 624. The paragraph ends with the sentence " *Quaere,* whether this was incuria; or is incuria unthinkable in the House of Lords? See further hereon *post,* p. 250." At p. 250, however, all we find is a discussion of the authority of a dictum of the House. At p. 341 we find the categorical statement that the House does not allow itself any exceptions similar to those which the Court of Appeal has reserved for itself in *Young's* case. It is only in a footnote (p. 280, fn. 1) that there is a mention of the possibility of a decision of the House being given in ignorance of a statute (an eventuality which would be incuria for the Court of Appeal—see p. 240). *London Street Tramways* v. *L. C. C.* [1898] A.C. 375, is noted on this point and the explanation given by the House apparently approved. One is left wishing for an answer to the rhetorical question, but at least a reference might be made to this footnote.

The author's respect for precedent does not spring from any underestimation of the judicial function. He considers that one of the historical functions of the courts has been " stopping up holes in leaky statutes " and he in no way holds that the need for certainty proscribes all but the literal interpretation of a statute. Thus the decision of the House of Lords in *Magor & St. Mellons R. D. C.* v. *Newport Corporation* [1952] A.C. 189 does not meet with his approval for it is the attitude of Denning L.J. in the lower court which demonstrates that which he would have supposed to be " an elementary duty of the judicial office."

The work of the judiciary in the exercise of control over the executive also receives some fresh attention. These pages have been especially well revised (although one wonders why *Smith* v. *East Elloe Rural District Council* [1955] A.C. 736 was not referred to) and, in particular, new paragraphs have been added on injunction and declaration. Some comments on the relevant parts of the Report of the Committee on Administrative Tribunals and Inquiries, 1957, are added as a second Appendix. Always the author emphasises that the delegation of administrative powers in a way which avoids judicial control makes superfluous any attempt to " save the rule of law " by any specific methods. The proposals made in the Report, in particular that for setting up supervisory councils, are applauded by the author. He regrets that no emphasis was laid on the rule that certiorari will only lie for error of law on the face of the record. The aptitude which the courts have recently shown for overcoming this difficulty serves, he admits, to negative the effects of the rule, as also would the implementation of the proposal that reasons should be given for all tribunal decisions. However, it still appears to him to be anomalous. No mention is made in the Report of the fact that injunction will not issue against the Crown and the missing of this opportunity is also regretted by the author. This rule is now mentioned and discussed in the text (see p. 561).

It may here be noted that there has been a change in the author's opinion on the vexed question of when a statutory instrument comes into effect. Previously his opinion, qualified by doubts, was that an instrument has legal effect from the time when it is published. Now he considers the better opinion to be that it comes into force as soon as it is made.

A new passage has been added on codifying and consolidating statutes. It is marred by the fact that a piece of information which is necessary for the comprehension of the text has been added only in a footnote (see p. 462). It would surely be better to state in the text that a consolidating Bill is not normally subject to amendment before the discussion of the Consolidation of Enactments (Procedure) Act, 1949.

There are some minor errors in the printing: on p. 133 we find *nec cla mnec precario*: on p. 283, fn. 1 still contains a reference to an affirmation or appeal which is now mentioned in the text: on p. 543 the first footnote is incorrectly numbered in the text.

Many new cases have been added in footnotes, but few, other than those mentioned above, have earned themselves a place in the text. The text has been revised throughout; the rare minor error has been corrected, unnecessary material has been omitted, and further perfection has been sought in the already lucid style. Alas, this new, up-to-date edition costs fifteen shillings more than the old.

BARBARA LILLYWHITE.

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By Harold Zink, Arne Wåhlstrand, Feliciano Benvenuti and R. Bhaskaran

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